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# IRISH COMMON LAW REPORTS.

## REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

## QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER, EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1856, 1857 AND 1858.


**Queen's Bench;**
BY WILLIAM M. JOHNSON, ESQ. AND THOS. BRUNKER, ESQ.

**Common Pleas;**
BY B. L. FLEMING, ESQ. AND SAMUEL V. PEET, ESQ.

**Exchequer;**
BY GRAVES CATHREW, ESQ. AND JAMES A. KIFT, ESQ.

**Exchequer Chamber;**
BY WILLIAM M. JOHNSON, ESQ. B. L. FLEMING, ESQ.
AND GRAVES CATHREW, ESQ.

**Court of Criminal Appeal;**
BY JOHN O'LEARY, ESQ.


## VOL. VII.


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# JUDGES AND LAW OFFICERS,

**During the period of these Reports.**

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## COURT OF QUEEN'S BENCH.

*Lord Chief Justice.*—The Right Hon. THOMAS LEFROY.
*Second Justice.*—The Right Hon. PHILIP CECIL CRAMPTON.
*Third Justice.*—The Right Hon. LOUIS PERRIN.
*Fourth Justice.*—The Hon. JAMES O'BRIEN.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JAMES HENRY MONAHAN.
*Second Justice.*—The Right Hon. NICHOLAS BALL.
*Third Justice.*—The Right Hon. WILLIAM KROGH.
*Fourth Justice.*—The Hon. JONATHAN CHRISTIAN.

## COURT OF EXCHEQUER.

*Lord Chief Baron.*—The Right Hon. DAVID RICHARD PIGOT.
*Second Baron.*—The Hon. RICHARD PENNEFATHER.
*Third Baron.*—The Right Hon. JOHN RICHARDS.
*Fourth Baron.*—The Right Hon. RICHARD WILSON GREENE.

## ATTORNEYS-GENERAL.

The Right Hon. JAMES WHITESIDE, Q.C.
The Right Hon. JOHN D. FITZGERALD, Q.C.

## SOLICITORS-GENERAL.

EDMOND HAYES, Esq., Q.C.
HENRY GEORGE HUGHES, Esq., Q.C.

## SERJEANTS.

JOHN HOWLEY, Esq., Q.C.
WALTER BERWICK, Esq., Q.C.
RICHARD DRAKY, Esq., Q.C.

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The following changes took place:—In March 1858, JAMES WHITESIDE, Esq., Q.C., was appointed Attorney-General, and EDMOND HAYES, Esq., Q.C., LL.D., Solicitor-General.

# A TABLE

OF THE

# NAMES OF THE CASES REPORTED.

**N.B.—*v (versus)* always follows the name of the Plaintiff.**

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# A TABLE

OF

# THE NAMES OF THE CASES CITED.

N.B.—*(versus)* always follows the name of the Plaintiff.

# COMMON LAW REPORTS,

OF CASES ARGUED AND DETERMINED IN

THE COURTS OF

## QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

Exchequer Chamber

AND

## COURT OF CRIMINAL APPEAL.

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### FINLAY *v.* LINDSAY.*

*(Queen's Bench.)*

H. T. 1857.
*Queen's Bench*
*Jan.* 19.

In an action of libel, for articles published in a newspaper, the defendant is not entitled, on motion, to an inspection of the articles on which the action is founded.

MACDONOGH (with him *Kernan*), on behalf of the defendant in this action, applied for an order directing an inspection of certain documents, stated to be libels, on which an action of libel had been brought against the defendant.

It appeared by the affidavits in support of the application, that the plaintiff was the proprietor of the "Northern Whig" newspaper, in which a number of articles had been from time to time published, reflecting on the Town-council of Belfast, of which the defendant was a member, charging the Council with mismanagement of the public affairs of the borough, and imputing to them improper motives. The defendant, it was alleged, had written or supplied hints for articles in another newspaper called the "Belfast Chronicle," in answer to these charges of the "Northern Whig;" and

* *Coram* CRAMPTON and PERRIN, JJ.

H. T. 1857.
*Queen's Bench*
FINLAY
*v.*
LINDSAY.

it was on these articles the present action was founded. The defendant, in his affidavit, admitted he had written certain articles in and for the "Chronicle," but denied that in these he had libelled any person. He stated that he had not kept any memorandum of these articles, and was refused by the plaintiff an inspection of them; and that this application was made to enable him to plead, either a denial of being the writer of the articles complained of, or a justification of such of them as, on inspection, he should discover to be his.

*Macdonogh.*

Under the new Law of Evidence Act, and the Common Law Procedure Act, we are entitled to this order, as the defendant is entitled to an inspection of such documents as he could obtain under a bill of discovery. The object of the Evidence Act was, to save litigation and prevent actions proceeding, if, on an inspection of the documents, the defendant could swear he did not write them: *Perrott* v. *Morris* (*a*). In that case, the Court of Common Pleas ordered an inspection of certain documents in the possession of the plaintiff to be produced to the defendant.

CRAMPTON, J.

I do not see the principle on which that application was granted. The test to be applied to an application like the present is, would a Court of Equity order the discovery of evidence in a case such as the present? If a defendant be entitled to see the documents by which a plaintiff's case is sustained, the plaintiff would be entitled to see those in the hands of the defendant, in order to make out evidence for himself.

PERRIN, J.

If this motion be granted, any man charged with an offence might insist on the prosecutor producing the evidence against him.

*Lynch* and *Jellett*, contra, were not called on.

(*a*) 8 Ir. Jur. 334.

H. T. 1857.
*Queen's Bench*
FINLAY
v.
LINDSAY.

CRAMPTON, J.

This motion must be refused, with costs. An inspection is to be ordered by the Court in all cases where a Court of Equity would order it on a bill of discovery; but no bill of discovery could be sustained in a case of this sort. The only ground suggested is the authority of the case of *Perrott* v. *Morris*, in the Court of Common Pleas. I am disposed to think there is a mistake in the report of that case, or that the matter was not fully before the Court. At all events we do not agree in that ruling as reported.

Motion refused, with costs.

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## TILLY *v.* FLETCHER.

E. T. 1857.
*April* 15.

A defendant will be permitted to register a rule to discontinue, without specifying the amount of the costs which may be added to such rule when taxed and ascertained.

BYRNE, for the defendant, moved that the officer be directed to attach his certificate, as of the 13th of March 1857, to the minute prepared by the defendant's attorney for registry of the rule to discontinue, entered that day by the plaintiff, and that the rule be registered as of the same date.

The officer had refused so to certify, as the amount of the costs payable to the defendant by the rule was not specified in the minute, in which the costs were stated as "not yet ascertained." That statement was sufficient. If the costs were taxed and ascertained before registration, the defendant should bear the expense of the registry; for the Taxing-master would allow only for costs actually incurred, and there could not be a second taxation. This would be an injustice to the defendant, if the registration of the rule be necessary for his protection; and it would seem that, unless the rule be registered, the defendant might become liable to refund whatever sum of money he should recover under it. The 3 & 4 *Vic.*, c. 105, s. 27, gives to those rules the effect of judgments; and the Irish Bankrupt Act, 12 & 13 *Vic.*, c. 107, s. 113, provides, with respect to all judgments,

E. T. 1857.
*Queen's Bench*
TILLY
*v.*
FLETCHER.

that, unless they be registered within twenty-one days from the time they are obtained, they shall be void in case of the subsequent bankruptcy or insolvency of the creditor; and if an execution should be levied, that the assignee may recover the fruits of it from the judgment creditor. Having regard to these provisions, it would be gross negligence in the defendant's attorney if he failed to register. The difficulty in the officer's mind has arisen from the language of the 3 & 4 *Vic.*, c. 105, s. 28, and the 7 & 8 *Vic.*, c. 90, s. 4, which require that the amount of the costs shall be specified in the minute; but that language, it is submitted, applies only to cases in which the taxation of the costs should, according to the course of the Court, precede the registration. In cases such as the present, it is the practice of the Common Pleas and Exchequer, and, until very recently, in this Court, to tax the costs after the registry, as in case of judgments. With respect to the latter, for example, judgment for the defendant on demurrer, where nothing but costs is awarded, the practice is similar to that which is sought to be established as to rules by this application. The minute is first presented for the Master's certificate, stating the costs as "unascertained;" then the registry takes place, afterwards the taxation, on which the costs of the registry are allowed, because incurred; and then, upon the attorney presenting the Taxing-officer's certificate, the blank left for the amount of the costs on the judgment-roll, and also that on the registry, are filled. That is the uniform and unquestioned practice as to judgments; and yet the language of the 2nd section of Sugden's Act, as to the registry of judgments, is exactly the same as that employed in the 4th section of the same Act, with regard to rules. That practice, as to judgments, must be erroneous, unless the construction of the 4th section contended for be correct; for where the same words appear twice in the same instrument, they must receive the same construction, in the absence of some indication of intention to use them in different senses.

[Here the officer informed the Court that the subject of the application had undergone discussion, in a case decided in this Court last Trinity Term; whereupon the Court directed the Counsel for the

defendant to mention the application again, when, upon inquiry, he had ascertained what had taken place in the case referred to].

E. T. 1857.
*Queen's Bench*
TILLY
*v.*
FLETCHER.
*April* 17.

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*Byrne* this day stated that the case mentioned by the officer was *Clifton* v. *Gillman*, not yet reported, decided in Trinity Term 1856. The copy of the order was in Court. It was an application to set aside a plea of a pending action, on the ground that before action the plaintiff had entered a rule to discontinue a previous action for the same cause, which was the alleged pending suit. No rule on the motion, as the costs of the first action were unpaid at the commencement of the second. Upon debate of the motion, stress was laid, by the Counsel for the defendant, upon the words of the 28th section of Pigot's Act, and of the 4th section of Sugden's Act; and he contended that the amount of the costs should be ascertained before registration. The Court, it is true, assented to this view; but it was not necessary to the decision; and their attention was not called to the fact that the language of the 2nd section of Sugden's Act was identical with that of the 4th, as to rules, and yet, according to the unquestioned practice, the costs of judgments were not ascertained until after the registry.

*Per Curiam.*

Take the order, in the terms of your application.

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## In re MILLER.

T. T. 1857.
*May* 28.

The Court of Queen's Bench in appointing Commissioners in England for the Irish Common Law Courts, does not limit them to a particular place within the district for which they are appointed.

On the 5th of May 1857, a commission issued out of the Court of Queen's Bench, appointing John Miller a Commissioner for taking Affidavits for the Irish Common Law Courts "*in the Bath district at Bristol.*"

T. T. 1857.
*Queen's Bench*
*In re*
MILLER.

*Reeves* now applied to amend the commission, by striking out the words "at Bristol." The Bath district comprises the counties of Gloucester, Somerset, Monmouth, Wilts and Dorset, the counties of the cities of Bristol and Gloucester, and the county of the town of Poole.

LEFROY, C. J.

I have had a communication made in reference to this matter, through my Registrar, and have ascertained that the Court of Chancery in Ireland does not limit its Commissioners for taking Affidavits in England to a particular place within the district for which the Commissioner is appointed; and we are of opinion that, in this respect, the practice of this Court should be similar to that of the Court of Chancery. In Ireland we confine ourselves to a county, and even to a particular place in that county; but in appointing Commissioners in England, we shall follow the practice of the Court of Chancery in Ireland.

Motion granted.

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NOTE.—By 13 & 14 *Vic.* c. 18, s. 47 (Process and Practice Act), the Court of Queen's Bench now appoints Commissioners for taking Affidavits or special bail for the Superior Courts of Common Law.

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REGINA, at the prosecution of CALLAGHAN,

*v.*

FISHBOURNE.

*May* 30.

A party applying for a mandamus should come in within a reasonable time after the injury complained of.

FITZGIBBON moved to make absolute a conditional order, that a mandamus do issue, directed to Joseph Fishbourne, commanding him, as arbitrator appointed under the provisions of the

Railway Acts, Ireland (1851), to inquire and adjudicate upon the compensation to be paid by the Company, for injury done to certain houses, the property of the prosecutor, by the execution of the works of the Wicklow Railway Company.

The affidavit of the prosecutor, on which this order had been obtained, stated that, in and previous to 1845, he was seised of certain houses and lands in the county of Dublin, along the line of the then projected Railway from Dublin to Bray, and that he was served with a preliminary notice of the intention of taking a portion of said land, for the purpose of said Railway. That in the year 1852 the works were commenced, and in 1853 an embankment was raised in front of said houses, which considerably deteriorated their value. That the Company did not require any portion of his property, and he consequently was not served with a notice to treat. That having been informed that Mr. Fishbourne was appointed an arbitrator between the Company and those claiming compensation for damage done to their property, he attended before him in the year 1852, when he was told by a person in the employment of the solicitors of the Company that there was no use in his making application for compensation, as he had no right to same. The affidavit further stated that he had been residing in England since 1851, and was unable, therefore, to observe the injurious effect caused by the said Railway to his property, and that he did not come to reside in this country until 1857. That he had made frequent applications, since his return, for compensation, and was refused.

*Deasy*, for the Company—

Showed cause against the granting of this order, relying on the length of time that had been allowed to elapse before any application was made to the Company for compensation.

LEFROY, C. J.

Five years have elapsed since this award was made; the parties had notice of the proceedings, and of the arbitrator acting; and this Court, in granting a mandamus, looks always to the consequences

T. T. 1857.
*Queen's Bench*
REGINA
*v.*
FISHBOURNE.

and also to the acts of the party who had such notice; it is his own fault if he did not proceed when the arbitrator was acting.

CRAMPTON, J., concurred.

MOORE, J.

I have always understood the rule of the Court to be, that a party applying for a writ of mandamus should apply within a reasonable time; and the Court does not extend the rule to parties remaining inactive, while they are cognisant of their rights.

Cause allowed.

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## DELAHUNT *v.* BENNETT.*

*June* 3.

On a motion to attach debts, under the garnishee clauses of the Common Law Procedure Act, the garnishee must appear by Counsel, and not by attorney.

HERON, for the judgment creditor, moved to make absolute a conditional order on the garnishee to pay over the money attached in his hands.

An attorney appeared to show cause on behalf of the garnishee.

*Coates* objected that a garnishee could not be heard by attorney.

PERRIN, J., having consulted with the other Members of the Court, directed that the garnishee must appear by Counsel.

* *Coram* PERRIN, J.

NOTE.—A similar order was made with regard to an execution creditor appearing on an interpleader motion.

T. T. 1857.
*Queen's Bench*

## MURPHY *v.* BENNETT.*

### CARROLL, Garnishee.

*June* 9.

Where the garnishee files an affidavit for cause against a summoning order, the plaintiff must bring the matter before the Full Court by motion on notice.

D. C. Heron, for the plaintiff, on a former day had obtained an absolute order to attach a debt of £6400, due by Carroll the garnishee to the defendant; and a summoning order had been served on the garnishee to appear before a Judge in Chamber.

*Owen*, for the garnishee, appeared to show cause. An affidavit had been filed.

Perrin, J., said that he had conferred with the other Judges of the Court, and the practice should be, where an affidavit was filed by the garnishee for cause, that the plaintiff should come before the Full Court by motion on notice, to make absolute the order upon the garnishee to pay notwithstanding the cause shown.

No rule.

* *Coram* Perrin, J.

T. T. 1857.
*Consol. Cham.*

## Consolidated Chamber.*

### COCHRANE *v.* CAMACK and others.

*June* 12.

In an action of ejectment on the title, the Court refused to allow facts to be pleaded as an equitable defence, under s. 85 of the Common Law Procedure Amendment Act (Ireland) 1856, where such facts would involve the taking of an account.

EJECTMENT ON THE TITLE.—Plea, by way of equitable defence, averred that, at the time of the defendant becoming tenant to the plaintiff of the said farm of land, with the mill and buildings thereon, one M'Cusker was in possession thereof as tenant to the plaintiff, and that the plaintiff, in order to get possession thereof, requested the defendant to pay to him (plaintiff), for said M'Cusker, the sum of £18, owing to plaintiff by said M'Cusker, for rent and arrears of rent of said premises, and that defendant accordingly paid said sum of £18, to the agent of the plaintiff, whereupon said M'Cusker gave up the possession of said farm of land and mill and premises to the plaintiff, who thereupon gave the same to the defendant. It further averred, that in consideration that defendant would within a reasonable time expend £150 in repairing and improving said farm of land and mill and premises, and erecting new and improved machinery in said mill, plaintiff promised defendant and undertook that he would not deprive him of the possession of said farm, mill and premises, or disturb him therein, so long as he should continue to pay the rent thereof regularly, without repaying to the defendant the amount so paid and expended by him as aforesaid. Breach, that although defendant expended the £150, and regularly paid his rent up to the 1st of May last, yet plaintiff refused to pay said sum of £18, or to reimburse defendant the amount of his said expenditure, or any part thereof.

*James Lowry* applied to set aside this defence.

It is settled now that the Court will not allow that to be pleaded as an equitable defence which would not in a Court of Equity entitle

* *Coram* CRAMPTON, J.

the party to a perpetual and unconditional injunction. It is submitted that this is not such a case. Further, an account must be taken of the sum expended, and a Court of Law has no machinery for that purpose.

*Brooke* and *S. Y. Johnstone*, contra.

This is not a case of account, it is an agreement for a lease, in fact an equitable lease: *Shep. Touch.*, p. 107. This is our sole plea, and is not open to the objection taken in *Mines Royal Society* v. *Magnay* (*a*); and when pleaded alone an equitable plea is not, *per se*, to be tested by the strict rules which the Courts have adopted with respect to other pleas.

*J. Lowry* replied.

We deny any such agreement; it is pleaded as a parol agreement, and is bad under the Statute of Frauds. The defendant must go to Equity.

CRAMPTON, J.

I cannot allow this plea to stand; at the same time it discloses a case for Equity; and the party can proceed in Equity by cause petition. Whether there was any such agreement is a serious question, and the landlord may have some matter of fact to put forward in denial that there was an agreement. It is utterly impossible to close this case without an account, and this Court has no officer, no machinery, no authority to take such an account. The order of this Court must be final and absolute.

Plea set aside. No costs.

(*a*) 10 Exch. 489.

T. T. 1857.
*Consol. Cham.*

*June* 19.

When a demurrer is set down for argument, and notice served, it is forthwith listed and liable to be called on.

## KENYON *v.* YOUNG.*

T. K. LOWRY (with him *W. Musgrave*) applied to set aside a judgment obtained on demurrer, and the subsequent proceedings thereon, on the grounds of irregularity. The rule setting down the demurrer for argument had been entered and notice served on June 10th, and the demurrer called on and allowed on the following day, in the absence of Counsel and attorney for the defendant.

*J. Robinson* and *J. F. Townsend*, for the plaintiff, resisted the motion.

BALL, J., after consulting the officers of the respective Courts, stated the practice to be that, as soon as a demurrer is set down and notice served, it is forthwith listed and liable to be called on, and therefore refused the motion on the ground of irregularity; but the defendant having made an affidavit of merits, the judgment was set aside on payment of costs.

* *Coram* BALL, J.

*June* 19.

In an action of ejectment on the title, both defendants, R. & W., had been served with the ejectment. R. took defence. W. died without taking defence, but after the expiration of the time limited for taking defence. Leave granted to enter a suggestion of the death of W., according to the former practice, this case not being provided for by the Common Law Procedure Act 1853.

## KELLY *v.* CALDWELL.*

W. HENDERSON applied for liberty to enter a suggestion of the death of one of two defendants in an action of ejectment on the title, under the following circumstances:—Both the defendants, Robert Caldwell and William Caldwell, had been duly served with the ejectment. Robert took defence; William died without taking defence, and after the time limited for taking defence had expired. This case is not provided for by the Common Law Procedure Act, section 217, that section being applicable only to the case of the death of one of several defendants who had taken defence: *Denny* v. *Jeffcott* (*a*).

*Per Curiam.*—Take the order.

* *Coram* BALL, J.

(*a*) 6 Ir. Jur. 282.

## JONES *v.* JEFFREYS.

*(Queen's Bench.)*

*May* 5.

Where a demurrer is taken to a portion of the cause of action in a summons and plaint, and the summons and plaint is then amended, the defendant has, under the 44th section of the Common Law Procedure Act, twelve days to plead to this amended summons and plaint.

EXHAM, on behalf of the defendant, moved that the notice of trial and the judgment entered on the third cause of action in this case be set aside, as said notice of trial was served before issue was joined. To this third cause of action a demurrer had been filed, and plaintiff then applied for liberty to amend his summons and plaint, and, having amended in pursuance of leave so granted, two days after he marked judgment because no defence had been filed to the plaint so amended. This was an irregularity, as the defendant had twelve days to plead after the amendment. The 44th section of the Procedure Act provides, that where an amendment of any summons and plaint is allowed, no new requisition to plead thereto shall be necessary, but the defendant shall be bound to plead to the amended pleading within the time specified in the original requisition, or within two days after notice of the amendment, whichever shall last expire, unless otherwise ordered by the Court or a Judge; and in case the amended summons and plaint had been pleaded to before amendment, and is not pleaded to *de novo* within two days after notice of the amendment, or such other time as the Court or Judge shall allow, the defence originally pleaded thereto shall stand and be considered as pleaded in answer to such summons and plaint. We say this case comes within the latter branch of the 44th section, the demurrer being still on record. A demurrer is now different from what it formerly was, and amounts to a defence: *Boylan* v. *Belfast Junction Railway Co.* (*a*); *Stradbrooke* v. *Unthank* (*b*).—[MOORE, J. The case of a demurrer appears to be a *casus omissus* in the Act.]—*Arch. Chitty*, by *Prentice*, p. 1215. The 90th section of the English Act differs somewhat from the Irish Act,

(*a*) 4 Ir. Com. Law Rep. 172. (*b*) M.SS., in Chamber.

E. T. 1856.
*Queen's Bench*
JONES
*v.*
JEFFREYS.

for the word "pleading" is used instead of the word "defence," in the Irish Act.—[MOORE, J. Why should the plaintiff be allowed to abridge the time for pleading, because of his own blunder in issuing an informal or bad summons and plaint?—CRAMPTON, J. If the defendant had pleaded instead of demurring, the section would apply, but a demurrer seems omitted in the Act.]

*O'Riordan*, contra.

Where a defendant pleads a plea, the Court says if he puts in no other defence he will have the benefit of that plea; and the first part of the 44th section is applicable to this case. It contemplates a case when a demurrer is gone, and the demurrer now on the file is a nullity; it is false and frivolous, because of the amendment, and has no applicability.

*Per Curiam.*

We will set aside this judgment. No costs.

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H. T. 1857.
*Jan.* 13.

On a motion to set aside pleadings as embarrassing, costs are discretionary with the Court, and will be awarded, though not demanded by the notice of motion, if the Court think it a fit case for costs.

## FARRER *v.* MORRIS.

THIS was an action for breach of a covenant for the enjoyment of an exclusive right of fishery. The summons and plaint set out an indenture of lease, dated the 18th of August 1834, by one Martin Morris to John Moore, of the house and lands of Spiddal Lodge, "together with the exclusive right of the fishery in the river Spiddal," for three lives; by which indenture Martin Morris covenanted with John Moore, his heirs, executors, administrators and assigns, "That he John Moore, his heirs and assigns, should "and would have full and free liberty and power, and the sole "and exclusive right of fishing in the said river Spiddal during the "continuance of the said demise." The summons and plaint then

stated an indenture, dated the 21st of August 1854, between John Moore of the first part, John Wilson Fitzpatrick of the second part, and the plaintiff of the third part, whereby John Moore conveyed, and John Wilson Fitzpatrick confirmed, unto the plaintiff the said lands and the fishery for the same lives as in the indenture of 1834. It then stated a breach of the covenant. To this the defendant pleaded, first, that Martin Morris, at the time of the making of the said indenture of the 18th of August 1834, had the exclusive right of the fishery in said river of Spiddal, so as to enable him to make such indenture of lease. Secondly, that John Moore did not grant or convey to the plaintiff the sole and exclusive right of fishing in the said river Spiddal, as same was demised by the said indenture of the 18th of August 1834 by the said defendant to the said John Moore.

*Todd* moved to set aside the defences, as being embarrassing, and because they tendered immaterial issues.

*Blake* (with him *M. Morris*), contra.

*Per Curiam.*

The pleas are clearly embarrassing, and must be set aside.

*Morris.*

The Court will not give costs of the motion against defendant, no costs being demanded.

*Per Curiam.*

Costs are discretionary. Allow the motion, with costs.

T. T. 1857.
*Queen's Bench*

## WEST *v.* BARRINGTON.*

*May* 29.

In cases of cross demurrers, the right to begin is regulated by convenience; thus, where the defendant has pleaded, and also demurred to the whole plaint, he is allowed to begin.

In this case the defendant, by leave of the Court, had pleaded and also demurred to the counts in the summons and plaint, and the plaintiff had also demurred to the defendant's pleas: both the demurrers now came on to be heard together.

*S. Ferguson* (with him *J. E. Walsh*), for the plaintiff.

Where there are cross demurrers, it is the right of the plaintiff to begin: *Barker* v. *The Midland Railway Company* (*a*); *Halhead* v. *Young* (*b*).

*D. Lynch* and *May*, for the defendant.

Lefroy, C. J.

Each case must depend upon the nature of the demurrers, and be regulated very much by convenience. Every Court settles its own practice. In the present case the defendant has demurred to all the counts in the summons and plaint; and if that demurrer succeeds, the case is at an end. The Counsel for the defendant therefore must begin.

Crampton and Moore, JJ., concurred.

(*a*) 18 C. B. 53, *note* a. (*b*) 6 El. & B. 312, 318.

* Perrin, J., *absente*.

T. T. 1857.
*Queen's Bench*

## BOYCE *v.* ROSBOROROUGH.

*June* 11.

An affidavit to ground an order for a commission to examine a witness resident out of the jurisdiction, on the ground that the party whose evidence is required is unable to attend, in consequence of ill health, must be positive, and one on information and belief is insufficient.

MACDONOGH (with him *D. Lynch*) applied for a commission to examine a witness whose evidence was required at the trial pending in this cause. The affidavit of plaintiff's attorney, upon which the motion was grounded, stated that he was informed and believed that the witness was unable to attend, in consequence of his delicate state of health.

*Lawson* and *Harris*, contra.

An affidavit on information and belief is insufficient, where it is in the power of the party making the application to produce an affidavit of persons who could depose positively to the fact. The attorney had it in his power to produce the certificate of the doctor in attendance on the witness sought to be examined, and is bound to do so, in order to show the application is *bona fide: Davis* v. *Lowdnes* (*a*); *Abraham* v. *Norton* (*b*).

LEFROY, C. J.

We must refuse this application. It would be a bad precedent to admit such an affidavit. We will allow the motion to stand for a positive affidavit.

(*a*) 7 Dowl. 101. (*b*) Ibid, 266.

## MORRIS *v.* HARTLEY.

*June* 4.

After a trial had, and a verdict set aside on an issue raised on the defence, the Court will not allow a replication to be pleaded, unless a strong case be made for the exercise of this jurisdiction.

CURRAN, on behalf of the plaintiff, applied for liberty to file a replication in this case. The action was brought for money paid and

T. T. 1857.
*Queen's Bench*
MORRIS
*v.*
HARTLEY.

goods supplied for plaintiff's use, to which the defendant pleaded; and on these pleadings the issue was, whether the money so paid was paid in liquidation of the plaintiff's demand? At the trial, a verdict was found for the defendant, and this verdict was set aside on motion, and a new trial awarded.—[MOORE, J. The Court of Common Pleas have refused, after a verdict has been set aside, to allow a motion of this nature, unless on notice grounded on affidavit.]—An affidavit is unnecessary in the present case. We admit the receipt of the money stated in the defence; but we say that money was paid on foot of a different demand, and we seek to reply that fact.

*Battersby*, contra.

After the verdict has been set aside, the Court will not allow a replication to be put on the file raising a new issue.

LEFROY, C. J.

We should be very slow to exercise this jurisdiction. Before we allow a party to frame a new pleading, after a trial, we ought to be satisfied, on affidavit, of the object of the party, and that the application was *bona fide*. No such ground has been laid for the present application; we must, therefore, for precedent sake, refuse this application, with costs.

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## THE QUEEN, at the prosecution of JOHN QUINLAN,

*v.*

## JOHN DANAHER and others.

M. T. 1857.
*Nov.* 2.

Application to bail prisoners, against whom a true bill for murder has been found by a grand jury, after a finding of manslaughter by a Coroner's jury, refused.

IN this case a verdict of manslaughter had been found against the prisoners by a Coroner's jury. At the Summer Assizes 1857, holden at Nenagh, for the county of Tipperary, the grand jury found a bill

of indictment against the prisoners, for wilful murder; but, owing to the illness of Danaher, the case was not tried at those Assizes.

*R. Armstrong* now moved that the prisoners be admitted to bail. Upon reading the informations, it will be apparent that the offence is, at the utmost, only manslaughter, and solvent and approved bail can be given to a large amount.

*Corballis*, for the Crown, referred to *Regina* v. *Chapman* (*a*).

LEFROY, C. J.*

This case was investigated by the grand jury, with the favorable circumstance before them that a verdict of manslaughter only had been found at the Coroner's inquest, and yet the grand jury found a bill for murder; under these circumstances, the Court cannot enter into speculations as to the crime being of a less serious character.

MOORE, J., concurred.

Motion refused.

(*a*) 8 C. & P. 558, 560.

* CRAMPTON and PERRIN, JJ., *absentibus*.

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## THE QUEEN
*v.*
## DANIEL GALLAGHER, JAMES M'BRIDE, DENIS COLL and PADDY COLL.

*Nov.* 5.

On an application to admit prisoners to bail, the Court will consider not only the amount of the bail, but also the probability of the prisoners appearing to take their trial; and therefore where, upon a charge of sheep-stealing, bail had been refused by the local magistrates, the Court, although it has a controlling power over the discretion of magistrates in such cases, will not interfere, unless satisfied that such discretion has been improperly exercised.—[PERRIN, J., *dissentiente*.]

IN this case, the prisoners had been committed to gaol on a magistrate's warrant, charged with feloniously stealing sheep, and bail

M. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
GALLAGHER

had been refused by the committing magistrates. It appeared by the affidavit of Thomas Fitzgerald, Crown Solicitor for the county of Donegal, that, for some time past, the mountains adjoining Gweedore in that county had been tenanted by Scotch and English settlers, who had imported a large number of sheep, of which about 1200 had been destroyed and made away with towards the close of the year 1856, and the beginning of 1857. Many of the carcasses of the sheep had been found buried, in bogs adjoining the said mountains, in a mutilated state; and at the Summer Assizes of 1857, holden at Lifford, for the county of Donegal, a presentment for the value of the sheep had been passed by the grand jury, and fiated, after investigation by Pennefather, B., and the amount of the presentment directed to be levied off the district in which the sheep were destroyed; that unceasing efforts were being made to bring the guilty parties to justice, and that deponent believed it would tend to frustrate the ends of justice if the prisoners were admitted to bail.

The only evidence against the prisoners was several informations made by James Boyle, an approver, in one of which he stated that the Colls had told him that their reason for killing the sheep was to hunt the Scotchmen out of the country, that the people might have the mountains to themselves again. It appeared, however, upon the information, that the Colls referred to were not the prisoners.

*R. Dowse* now moved that the prisoners be admitted to bail. It is laid down by Lord Campbell, C. J., in *Baronnet's case* (*a*), that, in applications of this nature, three points are to be considered—the charge, the nature of the evidence, and the punishment annexed to the offence. In the present case, the charge is sheep-stealing, and the only evidence that of an approver. Without going so far as to contend for it as matter of law, it is clear that, as matter of practice, the evidence of an approver must be corroborated: *Regina* v. *Stubbs* (*b*). The necessary elements therefore concur in favour of this motion; but I submit that the true principle to guide the

(*a*) 17 Jur. 184, 185; S. C., 1 El. & B. 1. (*b*) 1 Jur., N. S., 1115.

Court is that stated by Coleridge, J., in *Regina* v. *Scaife* (*a*), not to examine into the guilt or innocence of a prisoner, but to insure the certainty of his appearing to take his trial; solvent and sufficient bail will effect that.—[CRAMPTON, J. That is too wide a proposition; it is an element only in the consideration of the case.]—The affidavit of the Crown Solicitor shows that the object of keeping the prisoners in gaol is to facilitate the Crown in the procuring of evidence against other persons, and the Court cannot act on this principle in refusing bail.—[LEFROY, C. J. The prisoners have been committed on a charge of felony, and bail has been refused by the magistrates; this Court has a controlling power to see that a proper discretion is exercised by the local magistrates, and the public interest requires that they should be sustained in its due exercise. It would have been an undue exercise of that discretion in the present case, if there had not been sufficient *prima facie* evidence to convict the prisoners.]

*Major* and *Robert Johnston*, for the Crown.

There is sufficient on the face of the informations to warrant a jury in convicting, if they believe the evidence. The affidavit of the Crown Solicitor discloses that the destruction of these sheep is the result of a vast conspiracy against the English and Scotch tenants of this district. The mutilation of the carcasses proves that it is no ordinary offence of sheep-stealing. The magistrates are pursuing a strict investigation into all the circumstances, and the consideration that the enlarging of the prisoners would prevent these inquiries being successfully prosecuted will weigh with the Court on this motion. It is not the guilt or innocence of the accused persons which is now to be investigated, nor the amount of evidence which may probably be adduced against them at the trial; the magistrates, on the spot, anxious to secure their attendance to take their trial, have exercised a wise discretion in refusing bail, and this is not a case for the Court to interfere with that discretion. They referred to *Regina* v. *Seery*.*

(*a*) 9 Dowl. 553, 554.

* See next page.

M. T. 1857.
*Queen's Bench.*
THE QUEEN
*v.*
GALLAGHER

LEFROY, C.J.

The Court is of opinion that the prisoners cannot be admitted to bail. My Brother PERRIN, however, is of the contrary opinion. The circumstance of so large a number of persons being implicated in this conspiracy satisfies me that no amount of bail could insure their appearing to take their trial, because the very bail might be indemnified by a subscription raised to defray their liability. Consistently with the interests of justice, therefore, we cannot interfere in this case with the discretion with which the law has invested the local magistrates, and which they have exercised in refusing to accept bail.

CRAMPTON, J.

I am of the same opinion; this is not an ordinary case of sheep-stealing or sheep-killing, in which no doubt the prisoners might be admitted to bail; but it appears by the affidavit of the Crown Solicitor, that there is a deep-laid and wide-spread conspiracy to injure these persons who are not indigenous to the county of Donegal, and to "hunt them out of the country," by a wholesale system of destruction to their property. I quite agree in the view of my LORD CHIEF JUSTICE, that we should by no means arrive at any likely probability of these persons appearing to take their trial, if they were admitted to bail; the bail themselves might be members of this very conspiracy, and the Crown may have no means of ascertaining that fact. The presentment by the grand jury is a strong presumption of the existence of such a conspiracy, and, so

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E. T. 1857.
*May* 7.

## * REGINA *v.* BRIAN SEERY and another.

IN this case, the prisoners had been committed to the gaol of Enniskillen, on a magistrate's warrant, charged with maiming seven cows. It appeared by the affidavit of William Thompson, the son of the prosecutor, that a series of offences had been committed against the property of the prosecutor, during the three months preceding the committal of the prisoners, and that vigilant exertions were being made to discover the offenders; and the deponent stated his belief that the ends of justice required the detention of the prisoners.

*R. Johnston* now moved that the prisoners be admitted to bail.

*Corballis* and *D. C. Heron*, for the Crown.

The Court refused to interfere with the discretion of the magistrates.

Motion refused.

far from being a due administration of justice, it would be ancillary to defeating the ends of justice, if we were to grant this motion.

PERRIN, J.

Nothing warrants me in saying that the prisoners should not be admitted to bail, on giving solvent and sufficient security; the amount of the bail to be fixed by this Court, and the persons tendered to be approved of by the local magistrates.

MOORE, J.

I am of the same opinion with my LORD CHIEF JUSTICE and my Brother CRAMPTON. The informations and affidavit disclose an extraordinary outrage, the result of a wide-spread conspiracy; and even if an amount of bail were exacted, far beyond what persons in the prisoners' class of life could be expected to give, the observations of my LORD CHIEF JUSTICE would still apply; the appearance of the prisoners to take their trial could not be secured.

Motion refused.

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## DANIEL *v.* M'CARTHY.*

*Nov.* 10.

To an action for £102. 10s., for the rent of a house, the defendant pleaded (by way of defence on equitable grounds) a parol agreement between the plaintiff and defendant, in pursuance of which the plaintiff had accepted judgment by consent, in an action of ejectment for the house, for non-payment of £93. 15s., the rent due, and had taken possession of the house, and also of certain fixtures, goods and chattels, the property of the defendant, which fixtures, &c., together with the defendant's interest and good will in the house, being of the value of £200, it was agreed should be sold on behalf of the plaintiff, and the balance, after deducting £93. 15s., due for the arrears of rent, paid over to the defendant; and the defendant, averred that, owing to the plaintiff's neglect, the sale never took place.—*Held*, that this defence was not such an equitable defence as is contemplated by the Common Law Procedure Amendment Act (Ireland) 1856.

*Semble*, an equitable defence, within the meaning of that statute, must afford materials to the Court for doing complete and final justice between the parties.

* MOORE, J., *absente*.

M. T. 1857.
*Queen's Bench*
DANIEL
*v.*
M'CARTHY.

to hold from the 18th July 1840, at £86 a-year, payable quarterly, of which rent one year and a-quarter, amounting to the sum of £102. 10s., was due. The defendant pleaded for defence on equitable grounds that, after the letting a suit had been instituted in Chancery against the plaintiff, in which one William Daniel, son of the plaintiff, had been appointed receiver over (*inter alia*) the house in the plaint mentioned, and as such receiver was paid by the defendant all the rent due, except £93. 15s., and that it was arranged and agreed between the defendant, and the said William Daniel acting on behalf of and as agent for the plaintiff, that an ejectment should be brought in the plaintiff's name for non-payment of the said sum of £93. 15s., and that the defendant should give a consent for judgment therein, and should also give up to the plaintiff fixtures and certain goods and chattels, all the property of the defendant, of the value of £75; and the said sum of £93. 15s. was to be discharged out of a large sum to be realised by the sale of the defendant's interest and good will of and in the said house, fixtures, goods and chattels, which, at the time of the said agreement, were of the value of £200; and the said William Daniel personally undertook to dispose of the same, and the plaintiff was to look to the money to be realised by the sale of the said interest, good will, fixtures, goods and chattels, for payment of the said sum of £93. 15s., and not personally to the defendant; and the plaintiff, after deducting from the proceeds of the said sale the sum of £93. 15s., was to hand over to the defendant the balance thereof.

Averment, that the defendant gave the said consent for judgment, and that judgment was entered thereon by the plaintiff on the 2nd of October, and that on the 4th of October 1856, possession was demanded on the plaintiff's behalf, and the defendant then gave possession to the plaintiff of the said house and fixtures, goods and chattels, in performance of the said agreement; and that although the same, if proper steps had been taken for the sale thereof by the plaintiff or William Daniel, within a reasonable time after the said 4th of October 1856, would have produced the sum of £200, which would be more than sufficient to discharge the said arrears of rent, yet the said William Daniel and the said plaintiff used no diligence

about selling or disposing of the same, and by their negligence the same were never sold, and the defendant thereby lost the residue of the said proceeds, after deducting the said sum of £93. 15s.; and besides the damage sustained by the defendant in that behalf, the plaintiff in this action sought to disregard the said agreement, and in violation thereof to enforce payment of the said sum of £102. 10s.

*D. Lynch* now moved that the defence be set aside, on the grounds that the facts pleaded would not enable the defendant to obtain a perpetual injunction in a Court of Equity against the plaintiff's demand without terms, and also that the defence was embarrassing and ambiguous, and did not tender any material issue.—[CRAMPTON, J. Would Equity grant a perpetual injunction in this case? that is the test.]—The alleged agreement does not appear to be in writing, and there is no allegation of a release of the rent claimed by the plaintiff. Certain things are to be sold, and an account must be taken to ascertain their value. It is settled that the only equity regarded by a Court of Law is that on which a perpetual injunction could be obtained in a Court of Equity: *Turner* v. *M'Auley* (*a*). If this plea is well founded, the defendant has his remedy by a cause petition for specific performance, or by action against William Daniel.

*D. O'Riordan*, contra.

The defence consists of a single plea, setting out certain facts, which constitute an equitable defence to the action, without the necessity of an account being taken in Equity; and the true test is, would a perpetual injunction be granted on the grounds stated in the defence? The defence alleges that £93. 15s. only is due, and on this motion that must be taken to be the fact; the agreement ascertains the value of the good-will, fixtures, goods and chattels at £200, and the arrears of rent at £93; the balance after deducting the arrears is to be handed over to us.—[CRAMPTON, J. There must be an account to ascertain what that residue is, and nothing ought to remain to be done after a Court of Law has made its order.]—Here there is a clear equity, and that is sufficient for a

(*a*) 6 Ir. Com. Law Rep. 248.

M. T. 1857.
*Queen's Bench*
DANIEL
*v.*
M'CARTHY.

Court of Law to act upon; we have fulfilled all that we promised. On the face of the defence the rent is extinguished, and by the agreement the plaintiff was to take the good-will, fixtures and chattels, and not to look to us personally for the £93. 15s.—[LEFROY, C. J. Why then was there to be a sale?]—Because the interest, good-will, fixtures and chattels were of greater value than the arrears of rent, and a balance would be coming to us. But whether these matters were sold or not, the rent has been satisfied, and the defendant is the party who is prejudiced by the sale not having taken place, he is deprived of the balance of the proceeds; and besides that, he is now sued for the rent, which is most inequitable.—[LEFROY, C. J. It is open to you to go to a Court of Equity to ascertain this balance and enforce its payment; the defence seeks to make an agreement binding on one party and not on the other. This is not such a simple case as the Common Law Procedure Act requires.]

*Per Curiam.*—Let this defence be set aside with costs.

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## M'DONNELL *v.* BIRCH.*

*Nov.* 13.

Defence to an action on a bill of exchange, by the drawer against the acceptor, alleging that he did not pass any bill of exchange to the plaintiff on a day named, nor at any other time, set aside.

THIS was an action on a bill of exchange, the drawer against the acceptor, in the statutory form. The summons and plaint also contained counts for goods sold and delivered, and on an account stated. The defence alleged that the defendant did not owe any money for goods sold and delivered, or by a settled account, nor did he pass any bill of exchange to the plaintiff on the 4th of June, nor at any other time.

*R. Dowse* now moved that this defence be set aside, as not traversing any material fact, as embarrassing and amounting to the general issue. This defence expressly contravenes the 70th section of the Common Law Procedure Act 1853. "Pass a bill" is an expression not mentioned in that section, and not known to the law.

There was no appearance *contra.*—Motion granted with costs.

* *Coram* CRAMPTON, J., *solus.*

T. T. 1856.
*Queen's Bench*

## LEAMY *v.* WATERFORD & LIMERICK RAILWAY CO.

*May* 27.

Certain Companies were appointed by 26 *G.* 3, c. 58 *(Ir.)*, for building and maintaining a bridge over the river Suir, at Waterford, and they had power to charge tolls and erect a ferry. The Waterford and Limerick Railway constructed their terminus at a place within the limits of the ferry, and carried passengers and goods which came by their Railway, over the river, within the ferry limits, but did not charge any extra fare for so doing. —*Held*, that this was a disturbance of the right of ferry, and of the tolls, and that the case was properly left to the jury on the evidence to say if such disturbance were proved.

The summons and plaint in this action issued for the disturbance of a ferry and of bridge tolls; and in the first paragraph it was averred that the plaintiff, being lawfully possessed of a certain ancient ferry, over and across the Suir, from and to the quay of Waterford, for passengers, carriages, cattle and goods, taking for the same reasonable hire, tolls and ferryage, the defendants, on divers days, wrongfully and injuriously and against the will of the plaintiff, carried and conveyed for hire, in certaiu boats of the defendants, divers passengers and goods and cattle over and across the said river Suir, to and from the quay of Waterford, from and to the opposite side of the river, and upon the part of the river where the plaintiff had and hath such ferry, and upon the said ferry, whereby he was disturbed and injured in his right of ferry, and lost large sums of money, to wit, &c., whereof he was wholly deprived by reason of the wrongful acts of the defendants.

The second paragraph alleged the act of disturbance to have taken place near the said ferry.

The third and fourth paragraphs varied the local description of the ferry.

The fifth paragraph stated the plaintiff was possessed, under the authority of 26 *G.* 3, c. 58 *(Ir.)*, of a certain bridge over and across the said river, from a certain place on the quay of Waterford to the opposite side of the river, which bridge was erected and maintained pursuant to said Act, for the transit of foot passengers, carriages, cattle and goods, charging for same reasonable tolls, pursuant to the regulations in said Act; and that the defendants, during such possession, wrongfully and injuriously, and against the will of the plaintiff, carried and conveyed for hire, in boats and barges, divers passengers and goods chargeable with toll, that might, and otherwise would, have gone by said bridge over and across the river, from and to the side of the river near the bridge, and that part of the river crossed by the bridge; whereby the plaintiff was and is seriously

T. T. 1856.
*Queen's Bench*
LEAMY
*v.*
W. & L.
RAILWAY.

injured and disturbed in his right in said bridge and privileges appurtenant thereto, and has sustained damage as aforesaid.

The defendants pleaded that the river Suir, at the parts in the plaint mentioned, has always been and still is a public navigable river, and a public highway for all the liege subjects of the Queen to pass and re-pass thereon in boats and vessels, on their lawful occasions; that they are the proprietors of the Railway in the plaint mentioned, and that the line of Railway commences at and extends from the borough or city of Limerick to a certain place on the north side of the Suir, where it terminates; that the place where it so terminates is the terminus of the Waterford and Kilkenny and Waterford and Limerick Railways, and is situated at a point higher up the said river than the front of the Bilberry Rock in the plaint mentioned, which is at the opposite side of the river from the terminus; that the defendants, as common carriers, and empowered by the several Acts of Parliament in that behalf made and provided, have taken and continue to take fares and tolls for the conveyance of passengers, goods and cattle upon the said Railway, to and from the city of Limerick and other stations, from and to the Railway terminus, and that they have carried and conveyed, and continue to carry and convey for hire on said Railway, passengers, goods and cattle between the several stations and the said terminus, and passengers, goods and cattle which arrive by the Railway at the terminus, and no other passengers, goods or cattle whatsoever, down the said river to the quay at Waterford, above St. Catherine's Pill, without charging or receiving any hire therefor: and the defendants say it is not true, as in plaint alleged, that they carried or conveyed for hire any passengers, goods or cattle across the said river upon that part of the river where the plaintiff had or has the said ferry, or within or near the limits thereof, or upon the ferry of the plaintiff, or near to the said bridge, or upon or near that part of the river crossed by the said bridge.

On these pleadings, the issues were, first; whether the defendants disturbed the plaintiff in his several rights of ferry and bridge tolls, or any of them, by carrying passengers, cattle and goods, or any of them respectively, for hire, as in plaint alleged? Secondly, whether

the carriage of the passengers, goods and cattle from the terminus of the Railway at Waterford across the river to the quay of Waterford, without additional charge for said carriage, was or was not a disturbance of the plaintiff's right of ferry and bridge tolls? The case was tried at the Sittings after Michaelmas Term, before the LORD CHIEF JUSTICE.

In addition to some documentary evidence, the testimony established that plaintiff was lessee of the ferry and bridge tolls, under the Waterford Bridge Commissioners, for the last six years; that defendants, during 1854, sent their goods across the bridge by a carrier's floats, and that plaintiff was paid tolls on said goods, and when the carrier did not pay the tolls, the defendants were charged with them; that from July to December 1854, a sum of £115. 8s. 8d. was paid for tolls by the Company; that no boats were then used, but that the Company commenced plying their boats after the plaintiff's contract for the present year had been entered into; that goods were still carried by the carriers' carts; that passengers for the Railway before crossed the bridge, and it was their only mode of getting over the river until the boat was put on, and that persons not passengers by the Railway went across in the boat; that the tolls were necessarily reduced by the boat plying, and the goods traffic sensibly diminished. It was proved that the stage from which the defendants' boat started was nearly opposite a place called Bilberry Rock; that the Company have three stages, and that the second stage is nearer to the quay at Waterford, within the limits of Bilberry Rock.

The defendants proved that before the Railway was carried on to the present terminus, the goods were carried in boats, and that no charge was made for such carriage, but a sum per ton was charged for loading and unloading goods into and out of the boats, and was not more than such loading and unloading actually cost the Company; and that the same charge, save the sum per ton, would have been made whether the goods were or not carried across the river, or whether the passengers were or not carried across, and the only difference was the sum per ton for the goods; that the boat was exclusively for the Railway passengers and luggage, and not for goods.

T. T. 1856.
*Queen's Bench*
LEAMY
*v.*
W. & L.
RAILWAY.

The case having closed, the defendants' Counsel called for a direction that, in carrying the passengers and goods to and from their terminus, the defendants did not disturb the plaintiff's rights of ferry and tolls, and that the jury should find on the first issue for the defendants; but this the CHIEF JUSTICE refused, and left it to the jury to determine on the evidence whether the defendants did disturb the plaintiff's rights of ferry and tolls, as in the plaint alleged. With respect to the second issue, they also called for a direction that, in carrying the passengers to and from their terminus, for the fares and in the manner proved, was not a disturbance of plaintiff's rights, and, if they believed the evidence, they should find for the defendants; but his Lordship left it to the jury to say whether the carrying of the passengers' goods and cattle from the terminus of the Railway at Waterford across the river to the quay of Waterford, without additional charge for the carriage, was or was not a disturbance of plaintiff's rights of ferry and tolls. To these directions the defendants' Counsel excepted. The jury found for the plaintiff on both issues, with £100 damages.

*Lawson* and *Fitzgibbon*, for the exceptions.

Did the evidence prove a disturbance of the plaintiff's rights? We say not; for we contend that a carrier, in the conveyance of goods or passengers, may cross a river with them, notwithstanding the existence of a ferry: *Cory* v. *The Yarmouth and Norwich Railway Co.* (*a*); *Huzzey* v. *Field* (*b*).—[CRAMPTON, J. Suppose a gentleman in his own private boat goes from Kilkenny to Waterford, carrying corn, and goes under the bridge, would he be liable to pay toll?]—Clearly not, because any one in his own boat may cross without disturbing the right of ferry; it is setting up an opposition ferry that is illegal.—[PERRIN, J. If a man bring goods to the confines of a market, and sell them without going into the market, does he not render himself liable to an action?—LEFROY, C. J. Can a man by his own act give himself a right?—PERRIN, J. If the station be just below the bridge, and the Company there stop, and another Company carry the goods and passengers from that terminus to the quay, would not they be liable

(*a*) 3 Hare, 593; S. C., 3 Rail. Cas. 534. (*b*) 2 Cr., M. & Ros. 432.

for a breach of the ferry rights?]—The passengers would never come there save for the Railway: *Tripp* v. *Frank* (*a*).

*Peet* and *Macdonogh*, contra.

There was ample evidence to go to the jury, of a disturbance of the right of ferry; but if there were only a scintilla of evidence, the exceptions cannot stand: *Blacketer* v. *Gillett* (*b*). There is no distinction between public carriers and private persons seeking to avail themselves of right of ferry: a ferryman must carry every person, he is not to inquire whence they came, or in what character they travel. The carrying of goods and passengers across a river near a ferry is actionable, if it injure the ferry; and the question of disturbance is for the jury: *Hemphill* v. *M'Kenna* (*c*). So also is the carrying for hire a question for the jury. It cannot be said the Company are gratuitous carriers: *White* v. *Humphery* (*d*). The owner of a ferry has a right to any benefit of an increased traffic from a Railway; and whether the carrying across the river by the defendants be or not for hire, the injury is the same to the plaintiff: *Bleasett* v. *Hart* (*e*). These exceptions are in point of form bad, because it is misdirection, and not non-direction, that should be the subject of exceptions: *Anderson* v. *Fitzgerald* (*f*).

*Fitzgibbon* replied.

LEFROY, C. J.

We are of opinion the exceptions must be overruled; there is not a single authority to sustain them. Rights of ferry are well known and settled, and the principles of law which protect them have been long recognised. It was argued that it should not be regarded a disturbance of the right of ferry for the defendants to carry passengers over the river, unless they would otherwise have gone by the ferry; but if the Railway had never been constructed, a person going from Waterford to Limerick would presumedly have gone by the ferry, so that its construction cannot affect the question. The exceptions must be overruled.

CRAMPTON, PERRIN and MOORE, JJ., concurred.

(*a*) 4 T. R. 666.
(*b*) 9 C. B. 26.
(*c*) 8 Ir. Law Rep. 43.
(*d*) 11 A. & E., N. S., 43.
(*e*) Willes, 508.
(*f*) 4 H. L. Cas. 484.

E. T. 1856.
*Queen's Bench*

## DE BURGH and others *v.* THOMSON.*

*April* 25.

To a summons and plaint, alleging that the plaintiffs and A B, deceased, by deed, demised certain premises to the defendant for a certain term, and that during the term A B died, and the right to the premises, subject to the lease, became vested in the plaintiffs, and that the defendant committed waste on the said premises during the term; the defence averred that no right of A B, by virtue of said deed, survived to the plaintiffs.—*Held*, on demurrer, that this defence was bad, as raising an immaterial issue.

It is too late to object, on the argument of a demurrer, that the paper-books for the Judges were not made up within six days after the filing of the demurrer, as required by the 50th General Order.

THIS was a demurrer to a defence. The summons and plaint stated that the plaintiffs and one James Hewitt, by deed, dated the 1st of November 1848, let to the defendant certain premises, whereof the plaintiffs and James Hewitt were then seised in fee-simple, for a term of seven years, and that James Hewitt died during said term, and his rights under and by virtue of said deed, and to the premises thereby demised, and to the reversion therein expectant on the determination of said term, survived to the plaintiffs, and the plaintiffs thereupon became entitled to the reversion in said lands in fee-simple, expectant on the determination of said term; that the defendant entered and committed waste during the said term.

The defence to this summons and plaint averred that no right of the said James Hewitt, by virtue of said deed, survived to the plaintiffs. To this defence the plaintiffs demurred.

*Devitt*, in support of the demurrer.

This defence tenders an immaterial issue, as it is unnecessary, in an action of waste, for the plaintiff to set out his title: *Greene* v. *Cole* (*a*); *Harnett* v. *Maitland* (*b*). This is in effect a plea in abatement, being another form of relying on the objection that Hewitt's heir-at-law or legal representative is not joined as a co-plaintiff. Plea in abatement (unless with the leave of the Court) is taken away by the 84th section of the Common Law Procedure Act, for non-joinder of any person as a party plaintiff or defendant. The defendant cannot evade the provisions of this section by putting in a defence raising the same issue as a plea in abatement, though different in form. The averment in the writ of summons and plaint, that the plaintiff's right to the premises demised by

(*a*) 2 Wms. Saund. 234. (*b*) 16 M. & W. 257.

* *Coram* LEFROY, C. J., and CRAMPTON, J.

the lease survived to the plaintiffs, is not traversed, nor is the averment that they thereupon became entitled to the reversion in the lands, expectant on the determination of the term, traversed or denied. These averments must, therefore, under the 68th section of the Common Law Procedure Act, be taken as admitted; and they are sufficient to entitle the plaintiffs to maintain their action, even admitting that no rights of Hewitt under the deed survived to the plaintiffs, rendering the issue raised by this traverse wholly immaterial.

*S. Ferguson*, contra.

It appears that the demurrer books were not lodged within six days from the filing of the demurrer, as required by the 50th General Order. The demurrer ought, therefore, to be considered as set aside.—[LEFROY, C. J. We cannot go into that question on the argument. The objection is late.]—Facts alleged in the summons and plaint, if not traversed, are admitted. Plaintiffs were under no obligation to state their title; but having stated it, the defendant is entitled to deny any link necessary to show it to be a good title.

LEFROY, C. J.

In this case it was admitted there was no occasion to set out the plaintiffs' title; it was sufficient to say the defendant came in as tenant. The plaintiffs do, however, set out title, and they go beyond it. The summons and plaint shows the manner in which the defendant came into possession, and avers that one of the parties died; and thus accounting for his not being a party to the record, removes what would have been good ground for a plea in abatement; but that plea is now taken away, and if an objection of this kind is to be relied on, it must be by notice; therefore, if bound to do it, the defendant cannot do by traverse what he could not do by plea in abatement. The only object of introducing this statement of the death of the party was to account for his absence. The plaintiffs had a right to set out the tenancy under the lease; if they

E. T. 1856.
*Queen's Bench*
DE BURGH
*v.*
THOMSON.

had omitted that statement of the death of this party, they would have been defeated. This demurrer must, therefore, be allowed.

CRAMPTON, J., concurs.

This is indirectly a plea in abatement.

Demurrer allowed.

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M. T. 1857.
*Nov.* 9.

## HENDERSON *v.* HICKSON.

Where a case is made out to the satisfaction of the Court, the stringency of the 4th General Order of the 22nd of January 1856 will be relaxed.

Thus, in an action of ejectment for non-payment of rent, the attorney for the plaintiff having made an affidavit in the terms of that Order, the Court dispensed with the allegation in the process-server's affidavit of service, "that he knows not of, and does not believe that there is, any person other than those who have been served, who is a tenant under the lease or instrument sought to be evicted," &c.; and allowed judgment to be marked against five persons, not served with the summons and plaint, who were resident out of the jurisdiction, and appeared, by a search in the registry, to have an interest in the premises the subject of the ejectment, they having by letter disclaimed all interest therein.

FALOON, on behalf of the plaintiff, applied for liberty to mark judgment against five persons, though they had not been served with the writ of summons and plaint in this cause.

The action was ejectment for non-payment of rent, which had accrued due under a lease of certain premises in Belfast, used as Iron-works; and it appeared from the affidavit of the attorney of the plaintiff, that the writ issued on the 25th of February 1857, and was served on the defendant Hickson, on the Ulster Banking Company, and on a person named John Colvyn, who appeared, by a search in the registry, to have an interest in the premises sought to be recovered by the ejectment. In addition to the parties so served, the following persons, viz., Thomas Addison Barnes, Robert Pace senior, Robert Pace junior, Richard William Pritchard and William R. Colborne, appeared by the said search to have had an interest in the premises, and were all resident out of the jurisdiction, and had no agent, partner or relative in this country. That, on the 9th of April 1857, the attorney for the plaintiff addressed letters to the said several persons, requesting to know whether they now had or claimed any interest in the premises; and replies in writing were received from the said several parties (which replies were sworn to be in their respective handwriting, and appended to the affidavit),

stating that they had no interest in the premises. A copy of the summons and plaint was posted on the premises, same being vacant, and a duplicate of the writ was filed on the 25th of March 1857. The affidavit then added, in the words of the 4th New General Order of the 22nd of January 1856, "that he knows not of, and "does not believe that there is, any person other than those who "have been served, and the said T. A. Barnes, Robert Pace, sen., "Robert Pace, jun., Richard W. Pritchard and William Rushton "Colborne, tenants under the lease or instrument sought to be "evicted; or is in possession or receipt of the rents and profits of "the premises," &c. There was also an affidavit of the process-server as to the service, which omitted that part of the prescribed form of affidavit in the 4th General Order of the 22nd of January 1856, viz., "that he knows not of, and does not believe," &c.

This motion becomes necessary, on account of the requisites of the Rule of January 1856, elaborating the 187th General Order of January 1854. The process-server could not swear in the words of that Order, because of the five persons whose names appeared on the search having an interest in the premises; but their letters disclaiming any interest enable us to apply for a modification of that Order in the present instance, and authorise the Court to direct the officer to mark judgment. The premises were a partnership concern, which became insolvent; and it would seem that the parties would not go to the expense of a deed to relieve the title; but they all state that they are most anxious that the plaintiff should have possession, and would do anything necessary to accomplish it.

CRAMPTON, J.

You have made a case to dispense with that part of the process-server's affidavit referred to; and I shall make an order directing the officer to mark judgment against the five persons named, although they were not served with the summons and plaint.*

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* NOTE.—A similar application was made in the Court of Common Pleas, before Monahan, C. J. *(solus)*, who made a like order to mark judgment, but required it to be stated in the affidavit of service "that the deponent knows not of, and does not believe that there is, any person other than those who have been served, except the said Thomas Addison Barnes, Robert Pace, sen., Robert Pace, jun., Richard William Pritchard and William Rushton Colborne, who is a tenant under the lease," &c.

E. T. 1857.
*Exchequer.*

## KELLY *v.* DUFFY.

*(Exchequer.)*

*May* 5.

To a count for interest in a summons and plaint, a defence that no interest accrued due or became payable for the forbearance of money, &c., as in plaint, was *Held*, a good defence, and not amounting to the general issue.

THIS was an application to set aside the first defence hereinafter mentioned, as embarrassing. The summons and plaint contained counts for services rendered and money lent; and a further count for interest, for the forbearance of certain moneys due and owing by T. Duffy (defendant's testator) to the plaintiff, and by the plaintiff forborne to the said T. Duffy, at his request.

The defences filed to to this count were, first, that no interest accrued due or became payable from the said T. Duffy to the plaintiff for the forbearance of certain moneys due and payable by the said T. Duffy to the plaintiff, as in said summons and plaint alleged; secondly, that no moneys were forborne by the plaintiff to the said T. Duffy, as alleged.

*Devitt*, in support of the application.

This first defence in fact amounts to a plea of *nil debet*.—[PIGOT, C. B. How else can he traverse the fact of interest being due? There is always, in my opinion, considerable difficulty caused by that count for interest, under the present system of procedure; but I do not think plaintiff can be embarrassed by that plea.]—There are two allegations of fact in the count; first, that there were certain moneys due; and secondly, that they were forborne by plaintiff at defendant's request: and this defence does not traverse either of these facts.

*Johns*, contra.

A count for interest is unnecessary; and, if it be inserted, we must meet it by denying that it is due.

PIGOT, C. B.

E. T. 1857.
*Exchequer.*
KELLY
*v.*
DUFFY.

The defendant says, first, that no interest is payable; and then, to guard against the admission of the money having been forborne, he traverses that allegation in his second plea. We think the first plea must stand.

The other Barons concurred.

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## NORRIS *v.* COOKE and another.

T. T. 1857.
*May* 29.

The subsequent recognition of an unsigned contract in writing for the sale of lands, by the signature of his lawfully authorised agent, to a notice specifying and adopting the contract, is sufficient under the Statute of Frauds to bind the party contracting to be charged therewith.

*Semble*—It is a question for the jury, whether the agent signing the recognition be "thereunto lawfully authorised," within the terms of the statute.

THIS was an action to recover £150, the balance of a sum of £200, purchase-money of the plaintiff's interest in his dwelling-house and premises, stock in trade and fixtures, in Patrick-street, Cork. The only defence material to the present question was, that the defendants did not buy the premises, as alleged; and the issue was framed accordingly. The case was tried at the Spring Assizes 1857, for the city of Cork, before Crampton, J., and the following were the facts proved by the plaintiff at the trial:—On the 26th of September 1855, the plaintiff signed a memorandum or letter of agreement, with the defendant, in the following terms:—

"Cork, 88 Patrick-street, 26th September 1855.

"DEAR SIRS—I have this day disposed of my interest in my dwelling-house and premises, stock and fixtures of all kinds, in Patrick-street house, to you, for the sum of £200 sterling, you undertaking to discharge the half-year's rent due up to September next on the premises, and all rates struck since March. I, however, will pay the gas account up to the day I leave the premises. I agree to assign over the interest in the premises by a simple assignment to you, in case Mr. M. (the landlord) does not consent to give you a new lease for my original term, with a clause of surrender every three years.—Yours truly—M. NORRIS."

"Messrs. D. Sheehan & H. Cooke."

T. T. 1857.
*Exchequer.*
NORRIS
*v.*
COOKE.

This letter was not signed by the defendants, or any one on their behalf. They, however, paid £50 of the purchase-money, and were put into possession of the premises. The plaintiff, having subsequently got into difficulties, left the country; and on the 2nd of October, Mosely, an agent for some of his (plaintiff's) creditors, called upon Mr. Hodder, the defendant's attorney, to make inquiry concerning the plaintiff's property, when the said letter of agreement was shown to him (the said agent), and he was informed of the various circumstances of the case.

On the 5th of October, the plaintiff, having been arrested in Liverpool at the suit of his creditors, to obtain his release executed a deed of assignment of all his personal property, stock in trade and effects (but which did not include the house and premises in question), to said Mosely and another, trustees for the benefit of his creditors; and on the 11th of October, the defendants' attorney was served with a notice, dated on the previous day, from the solicitor of the trustees in that deed, notifying the said assignment, and cautioning against interference with any property or goods which were of the said Norris, and intimating that any party interfering therewith would be held responsible. To this Mr. Hodder replied by another notice, which was as follows:—

"SIR—In reply to your notice, dated the 10th instant, I hereby, "as solicitor for the said Cooke & Sheehan (the defendants), inform "you that, on the 26th of September last past, Mr. Norris (the "plaintiff), in your notice named, sold to them all his interest "in his dwelling-house and premises, stock in trade and fixtures "of all kinds, in Patrick-street house, for the sum of £200, subject "to the performance of certain provisions, which are more parti-"cularly set forth in a certain memorandum of the said sale, bearing "date the day aforesaid, and signed by the said M. Norris; and that "on the same day the said Sheehan & Cooke paid to the said "M. Norris the sum of £50, in part payment of said sum of £200, "and were put into possession of the said dwelling-house and pre-"mises by the said M. Norris, and have ever since continued in "possession thereof; and further inform you that, long since, and "before the date of the alleged assignment of the 5th of October,

"in your notice mentioned, I informed the agent for Mr. Mosely "that the said M. Norris had sold to said Sheehan & Cooke his "interest in said dwelling-house and premises, and at same time "showed him the said memorandum of the 26th of September; and "as you have not in your notice stated the name and residence "of the other assignee, to whom the alleged assignment of the "5th of October was made, I hereby require you to inform me "in writing of the name and place of residence of each and every "of the persons to whom the said house and premises were "assigned by that assignment; and take notice that I hereby "require them to execute to the said Sheehan & Cooke an assign-"ment or conveyance of the legal estate in said dwelling-house "and premises, pursuant to the contract for that purpose entered "into with them by said Norris; and that, upon the terms of "said contract, which, upon the part of said M. Norris, were to "be performed, being fully carried into execution, they, the said "Sheehan & Cooke, are ready and willing, and hereby offer, to "pay the balance which shall appear to be due on foot of the "said purchase-money, to your clients, upon their showing that "they are entitled to receive and give discharges for it. And I "require your answer to this notice within seven days; and in case "you decline to comply with the terms of it, I will file a cause "petition against your clients for a specific performance of said "contract, and will use this notice as I shall be advised.

"Dated this 17th October 1855.

"F. HODDER, Solicitor for Sheehan & Cooke."

With this evidence the plaintiff closed his case; and the Counsel for the defendants having called on the learned Judge to direct a nonsuit, on the ground of there being no sufficient signature of the contract to bind the defendants, within the meaning of the 2nd section of the Statute of Frauds, he did so, reserving the question in the following form:—"By consent then I nonsuited the plaintiff, "subject to the opinion of the Court above. A verdict for £150 "is to be entered for the plaintiff, in the event of the Court above "being of opinion that the signature of Mr. Hodder, acting as "attorney for the defendants, to the notice of the 17th of October,

T. T. 1857.
*Exchequer.*
NORRIS
v.
COOKE.

"was equivalent to a signature by the defendant, to satisfy the "Statute of Frauds." A conditional order having accordingly been obtained for setting aside the nonsuit, and entering a verdict for the plaintiff—

*Macdonogh* (with him *Copinger* and *Sullivan*), on behalf of the defendants, now appeared to show cause.

The first question is whether this notice, signed by the defendants' attorney acting as such, is sufficient to satisfy the Statute of Frauds, 7 *W.* 3, c. 12, s. 2? In *Howard* v. *Braithwaite* (*a*), Lord Eldon says, that by the words of that statute, some agent "thereunto," he understands to the signing thereof lawfully authorised by the party. Next, whether it is a sufficient note to make the former unsigned contract binding on the defendants? It is a writing, containing merely a declaration of a past fact, and not intended to authenticate or perfect an incomplete contract; it is addressed in reply to third parties who intervene, making an inaccurate statement as to their being assignees, whereas the house was not at all comprised in the assignment of the 5th of October; and it refers to the contract, not with a view of completing it, but of meeting the claim of the creditors: *Stokes* v. *Moore* (*b*). Sir *E. Sugden*, in *Ven. & Pur.*, pp. 113, 114 (13th ed.), lays down that "rent-rolls, particulars of estates, &c., delivered by the vendor "on the treaty for sale, will not be considered as an agreement, "although signed by him, and containing the particulars of the "agreement; nor will letters written, or representations made by "him to creditors, concerning the sale, receive that construction;" and he refers to *Whaley* v. *Bagnel* (*c*) in support of that position.

*R. Deasy* (with *O'Riordan*), contra.

The right to the unpaid balance of the purchase-money was vested in the assignees under the deed of the 5th of October. The authority of defendants' attorney is not denied by any evidence against it; the defendants declined to give any such evidence, rest-

(*a*) 1 Ves. & B. 207. (*b*) 1 Cox, 219.
(*c*) 1 Bro. P. C. 345.

ing on their point of law; and it appears by this notice that he was employed to complete the contract, and, if necessary, to take proceedings to enforce it. One of the incidents of its completion is the recognition of the contract. In *Dobell* v. *Hutchinson* (*a*), Lord Denman, C. J., says that the cases establish this principle, "that when a contract in writing or note exists, which binds one "party, any subsequent note in writing, signed by the other, is "sufficient to bind him; provided it either contains in itself the "terms of the contract, or refers to any writing which contains "them." *Shippey* v. *Derrison* (*b*), cited with approbation in *Sug. Ven. & Pur.*, pp. 114, 117; *Barkworth* v. *Young* (*c*).—[RICHARDS, B. Any parol authority is sufficient to authorise an agent to bind his principal, by signing, under the Statute of Frauds; and was there not therefore a question for the jury as to whether Mr. Hodder was duly authorised so to sign this notice?]—The defendants should have offered evidence to show that he was not so authorised; but they did not do so. The defendants and their attorney were in Court during the day, and offered no evidence to rebut the presumption of his authority.

*Copinger*, in reply.

The plaintiff, who sought to bring this signature within the Statute of Frauds, was the proper party to have given evidence of the agent's authority. The only question is whether, acting as attorney, Mr. Hodder was a person thereunto lawfully authorised? *Thornbury* v. *Bevil* (*d*).—[RICHARDS, B. I think in the case of *Whaley* v. *Bagnel*, the contract was incomplete.]—*Thynne* v. *Lord Glengall* (*e*); *Townshend* v. *Bishop of Norwich*, cited in *Sug. Ven. and Pur.*, p. 114; *Farrell* v. *Hickie* (*f*).

PENNEFATHER, B.

This case comes before us on an application, on behalf of the

(*a*) 3 Ad. & E. 355.
(*b*) 5 Esp. 190.
(*c*) 3 Eng. Jur., N. S., 34.
(*d*) 1 Y. & Col., C. C., 554.
(*e*) 2 H. L. Cas. 131.
(*f*) 2 Ir. Jur., N. S., 329.

T. T. 1857.
*Exchequer.*
NORRIS
*v.*
COOKE.

plaintiff, to set aside the nonsuit entered by Mr. Justice Crampton, at the last Assizes for the city of Cork; and to enter a verdict for the plaintiff, pursuant to the leave reserved by him. A good deal turns on the question as to the manner in which this point was reserved; but at present I shall state some of the facts which appear unquestioned in the case. It appears that, on the 26th of September 1855, the plaintiff wrote a letter to the defendant, in which he stated explicitly that he had agreed to sell his interest in a certain house and premises, on certain terms mentioned in the letter; and, in pursuance of that letter, containing unquestionably an agreement on the part of the plaintiff to sell the house, a sum of £50 was paid by the defendants to M. Norris, in part payment of the purchase-money; and they received from him the possession of the house and furniture. So far as M. Norris was concerned, it was a perfect agreement, so as to bind him within the Statute of Frauds. It appears that Norris left the country; and on the 10th of October, a notice was served, on behalf of persons claiming to be creditors of Norris, on the defendants, by their attorney, in which they claim a right to Norris' property, under an assignment alleged to have been made to them on the preceding 5th of October. This notice appears to have been given in perfect ignorance of the letter of the 26th of September, and claims the property as belonging to these gentlemen for the benefit of the creditors of Norris. It is stated that the deed of assignment to these gentlemen does not contain any assignment of the premises in question. In answer to this notice of the 10th of October, is a notice, signed by Mr. Hodder, the attorney unquestionably of the defendant; and this notice apprises the attorney of the plaintiff's creditors that the house had been sold by Norris to the defendants. The agreement of the 26th of September, which contained the particulars of the sale, was referred to by that notice, and relied on by the defendants as a sale to them of the interest in the house; and that notice threatens that, if the legal estate was not conveyed, proceedings in the Court of Chancery would be instituted to enforce the contract, which the defendants insisted upon as a sale.

Upon these notices and these facts being given in evidence for the plaintiff, Crampton, J., nonsuited him; reserving, however, the question for this Court, whether the signature to the notice of the 17th of October was binding on the defendant, within the Statute of Frauds, being the signature of Mr. Hodder, the attorney confessedly for the defendants? If the nonsuit should be wrong, the verdict was to be entered for the plaintiff for £150; and therefore the first consideration which comes before us is, whether the nonsuit was wrong? It is quite clear, we think, on the cases cited, and especially that cited by Mr. *Deasy (Dobell* v. *Hutchinson)*, that where one party is bound by a written agreement, not signed by the other party, if the other recognise, by writing signed by himself, the former agreement, in terms admitting of no ambiguity, that is a sufficient designation of the agreement, within the Statute of Frauds; and I take it that, in the argument of the case, this was conceded. But it is contended that that principle does not extend to anything beyond the signature of the document by the party himself, and that a signature by the agent of the party is not sufficient; and more particularly, that there must be full proof that the signature of an agent was by him acting as a person duly authorised, and not merely as an attorney. The words of the statute are:—"No action shall be brought to charge any person upon "any contract or sale of lands, tenements or hereditaments, or "any interest in or concerning them, unless the agreement upon "which such action shall be brought, or some memorandum or "note thereof, shall be in writing, and signed by the party to "be charged therewith, or some other person thereunto by him "lawfully authorised." These words, it would appear to me, put the case of a person thereunto lawfully authorised on precisely the same footing as the party himself; and that if a subsequent recognition of the contract be made by an agent thereunto lawfully authorised, the party is as much bound as if it were made by himself.

I must now consider the terms in which this question was reserved by the learned Judge at the trial. It certainly does appear to me that there was at least a question for the jury,

T. T. 1857.
*Exchequer.*
NORRIS
*v.*
COOKE.

whether the signature to this instrument (which unquestionably was that of Mr. Hodder) was put to the instrument by him as the lawfully authorised agent of the defendants, or merely as their attorney? If so, and if this was a question on the evidence for the jury to decide upon, and if they might, on that evidence, have found that Mr. Hodder was authorised as an agent to sign that document, and to recognise the original letter of agreement, then I should say that the nonsuit was wrong. Then the question is, what course should now be taken? It would appear to me that there is a consent, which says, "if you are not right in nonsuiting the plaintiff, there must be a verdict for him." It was contended very strongly for the defendant that it lay on the plaintiff to give further evidence on this point; but I think that there was a case made by the plaintiff sufficient to entitle him to call on the learned Judge to have it left to the jury. There was clearly a case here on which the jury might have found for the plaintiff; and, if so, we ought not to put the parties to the expense of another trial. To be sure, further evidence might have been given on the part of the plaintiff; but then he had made out a *prima facie* case, and it lay on the defendants to contradict that. Not having done so, it must be taken that they have conceded that their attorney, although acting as an attorney, had the further capacity of signing this document as an agent lawfully authorised. Therefore I think that in this case the verdict should now be entered for the plaintiff.

RICHARDS, B.

I concur with my Brother PENNEFATHER. There was a clear and unequivocal contract prepared between the parties on the 26th of September; there is no doubt as to the intention of both parties to be bound by it. One of the parties signs it; the other parties (the defendants), although they do not sign it, take large benefits under it. A part of the purchase-money was paid; that was not sufficient to bring the contract within the Statute of Frands. The defendants took possession under the contract; that was not sufficient. Then the question is, whether the notice of the 17th of October be sufficient? It must be confessed that Mr. Hodder was

employed by the defendants, touching this very agreement, and to maintain their rights with respect to it; and there is some evidence to go to the jury that he was not merely employed as an attorney, but to put forward and rely on the defendants' title, and, if necessary, to give a formal assent to the original agreement. The notice signed by him is in reply to the notice of the creditors' solicitor, and in that he affects to act as fully authorised to make the offer conveyed in it. The authority which he received from the defendants to serve this notice, he may have by parol only; it is not necessary that it should be in writing. Now, if this document had been signed by the party himself, it could scarcely be argued that it would not be a sufficient note in writing to charge him. The question is then, whether the same rule should not apply where it is signed by his agent? The case of *Dobell* v. *Hutchinson* shows that the other party, not signing, may bind himself by a subsequent recognition of the contract signed by him. I do not see why he should not be bound by the recognition of the agent; and therefore concur in thinking that this nonsuit should be set aside; and, in consequence of the way in which the point was saved by the Judge, and agreed to by the parties, I think there is nothing left for us to do but to direct a verdict for the plaintiff for £150.*

* PIGOT, C. B., and GREENE, B., *absentibus.*

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## BERGIN *v.* PEPPER.

*June 5.*

Under the Common Law Procedure Act writs of *scire facias* and revivor against members of a Joint-stock Company, upon a judgment recorded against its public officer, must be served personally, as ordinary writs of summons and plaint.

*Semble.*—The rule that an application to set aside proceedings must be made within a reasonable time only applies when the proceedings are irregular, not when they are illegal or unwarranted.

This was an application that a judgment marked upon a writ of *scire facias*, on the 30th of January, by the plaintiff, should be set aside, at the costs of the plaintiff; and that the defendant might

T. T. 1857.
*Exchequer.*
BERGIN
v.
PEPPER.

have liberty to plead to the said writ on the ground that said judgment was improperly marked, as it did not appear by the affidavit of service that personal service was had on the defendant, or that due and reasonable diligence had been exercised in endeavouring to effect such personal service, and without effect, and because no order for the substitution of such service was made, to warrant the marking of said judgment; and for the costs of the motion.

The writ of *scire facias* had been issued against the defendant, who was a shareholder in the Tipperary Joint-stock Banking Company, on foot of a judgment obtained against George M'Dowell, the official manager, for the sum of £498. 12s. 2d. The affidavit of service merely stated that service of said writ had been effected by delivering unto, and leaving a true copy thereof with the woman-servant (aged sixteen years) of the defendant, in his dwelling-house, and that she informed the server that defendant was not at home, when he desired her to give the said copy to the defendant, and showed her the original writ; and it stated also that it was believed the defendant was then resident within the jurisdiction, and was trying to evade personal service of the writ. The officer of the Court had permitted judgment by default to be marked, upon the filing of this affidavit, considering it to be sufficient.

The defendant had filed an affidavit, stating that he was not hiding himself, but was at another part of the country when the writ was served.

*D. Lynch* (with him *C. H. Woodroffe*), in support of the application.

The 153rd section of the Common Law Procedure Act 1853 directs that writs of *scire facias* against members of a Joint-stock Company, upon a judgment recorded against its public officer, shall be dated, directed and proceeded on in like manner as writs of revivor; and by the 151st section, writs of revivor are to be proceeded upon in the same manner as a writ of summons and plaint. Now, a summons and plaint must be personally served, unless it appears by the affidavit of service that due and reasonable diligence has been exercised in endeavouring to effect such personal service, and without effect (section 32).

*D. C. Heron*, contra.

A discretion is given by section 99 to the officer of the Court, which he has has exercised. Before the passing of the Procedure Act, personal service was not required of writs of *sci. fa.*: 1 *Ferguson's Prac.*, p. 473. Then the 131st General Order, under the Process and Practice Act, directed that the writ should be directed to the Sheriff of any county, but did not require personal service. Then the Common Law Procedure Act was passed, repealing the Process and Practice Act, but not intending to alter the practice as to service; it re-enacts, in the 151st section, that the writ of *scire facias* may be served in any county. It is not meant to change the existing practice, but merely to re-enact the rule allowing service in any county. A *scire facias* is not mentioned in terms in the 31st or 32nd sections.—[GREENE, B. The words "otherwise proceeded upon," in the 151st section, mean in every respect.—PENNEFATHER, B. I think the words "may be served," in the 151st section, may be read in connection with the words "in the same manner as a writ of summons and plaint." And surely, in a proceeding like the present, where it is sought to make a judgment obtained against the official manager available against a third party, the same notice should have been given him as he would have been entitled to if the proceedings were originally against him.]—Even supposing personal service to be required, the service effected here is sufficient. It has been held a sufficient compliance with the 12 *G.* 1, c. 29, s. 1 (in England), which requires personal service of process, to show such circumstances as satisfy the Court that the process has come to the hands of the defendant: *Williams* v. *Pigott* (*a*); *Phillipps* v. *Ensell* (*b*); *Toms* v. *Nash* (*c*). This application is not made within a reasonable time, although the defendant had notice of the judgment, which was marked on the 3rd of January: 179th General Order.

*C. H. Woodroffe*, in reply.

(*a*) 1 M. & W. 574. (*b*) 2 Dowl. P. C. 684.
(*c*) 2 Scott, N. R., 598.

T. T. 1857.
*Exchequer.*

BERGIN
v.
PEPPER.

PENNEFATHER, B.*

This application must be complied with. It appears very clear, that a writ of revivor ought to be served in the same manner as a writ of summons and plaint, and the officer is not authorised to act on any other service than that. There have been no sufficient grounds laid in this case to dispense with personal service. We consider that the officer has certainly put a wrong construction on the Act, and that he had no authority to permit this judgment to be marked.

The party now coming to set aside the judgment appears to have had notice of it some short time: at least he does not deny it. Now if this judgment had been duly entered, after a proper service, there might be a question whether he does not come too late. All the cases on this head, it is true, seem to require that the party coming to set aside a judgment should come within a reasonable time; but in those cases there was a personal service of the writ: and that rule only applies to cases where the judgment is warranted by all proper circumstances being complied with.

We think this judgment must now be set aside, with costs.

RICHARDS, B.

I concur in the rule pronounced by my Brother PENNEFATHER, who has stated very clearly the import of the Act. I do not think the defendant should be fixed with the costs by the fault of the plaintiff, he having only taken his steps for the protection of his property.

GREENE, B.

I have to express my concurrence in the rule pronounced, and that this judgment was entered without any legal authority, and that it is somewhat more than a mere irregularity.

* PIGOT, C. B., *absente*.

T. T. 1857.
*Exchequer.*

H. CLARKE, Public Officer of the Belfast Banking Company,

*v.*

BOWMAN.

*(Exchequer.)*

*June* 8.

In an action on a lost bill of exchange, plaintiff offered an indemnity (which was insufficient) to the defendant, which the latter, without making any objection as to its insufficiency, refused altogether to accept, and pleaded the loss of the bill. The plaintiff having applied to set aside this defence, and for liberty to mark this judgment :—*Held*, that his proper course was that pointed out by the 90th section of the Common Law Procedure Act 1856, namely, to apply to the Court to settle a proper indemnity, when that proposed was refused by the defendant; but in consequence of the defendant's conduct, and his not having made a specific objection to the proposed indemnity, that the motion should be granted, without costs, upon plaintiff's entering into a proper indemnity.

This was an application on behalf of the plaintiff, that the defences filed to the first and second paragraphs of the summons and plaint be set aside; and that the defendant be restrained from setting up the loss of the two bills of exchange in said paragraphs respectively mentioned, as a defence to the action; and that the plaintiff be at liberty to mark judgment as for want of a defence; inasmuch as said defences were contrary to the Common Law Procedure Act 1856, and as same were filed, though a proper indemnity had been tendered to the defendant by the Belfast Banking Company against any loss that would arise to the defendant by reason of the non-production of the two bills.

The action was brought by the indorsee against the acceptor, and the summons and plaint contained two paragraphs, respectively setting out the two bills of exchange. The defendant had pleaded that before the commencement of the action, and whilst the plaintiff was holder of the bills, he had lost the same, and was unable now to produce them, and that such bills were not specially indorsed, but were transferable by delivery.

The affidavit of the plaintiff stated that before the plaintiff, who had lost the bills, had issued the summons and plaint, he had tendered to the defendant a letter of indemnity, signed by the general manager of the Company, and which was the form of guarantee for indemnity usually given by the Company on such occasions. That the defendant made no objection to the indemnity offered, by reason of its insufficiency, but refused to accept it, or to treat concerning it at all.

T. T. 1857.
*Exchequer.*
CLARKE
v.
BOWMAN.

*Falconer*, in support of the application.

We had no course to adopt but the present, as the defendant refused even to listen to the indemnity proposed: *Charnley* v. v. *Grundy* (*a*). The defendant may rely on the case of *Armstrong* v. *Scholefield* (*b*); but that was an application on the part of the defendant; and the jurisdiction given by the 90th section of the Common Law Procedure Act 1856, to the Court, to prevent this defence being set up, is in favour of the plaintiff, and is to be exercised only on an application by him.

*T. Lynch*, contra.

The 90th section only authorises an application to the Court to approve the form of indemnity; and that offered here is not sufficient, as it should be under seal, and signed by the public officer.

PIGOT, C. B.

I think the indemnity now required by the defendant should be given; and, upon that being done, we shall set aside these defences. My own view of the Act is, that where the plaintiff knows he has lost the bill, he ought in the first place to do just what he has done in the present case, that is, to offer an indemnity; and if that be objected to, he then ought to come to the Court to settle whatever indemnity may be proper, and thus oblige the defendant to accept it. The plaintiff is the person who ought in the first instance to act. He appears in this case to have offered an indemnity. That was right; but the defendant refused to accept of that or any other indemnity: in which he was wrong. The plaintiff then did not come to the Court to have the indemnity settled; which was wrong on his part. Therefore, having regard to the defendant's not having made an objection specifically, although I think the plaintiff's proper course was to have come to the Court to approve of the indemnity upon the defendant's refusal, we shall direct that, upon plaintiff's giving indemnity by bond, executed by the proper officer, within

(*a*) 2 Eng. Com. Law Rep. 822. (*b*) 1 Exch., N. S., 494.

ten days, these defences be struck out, and that the plaintiff be at liberty to mark judgment.

PENNEFATHER, RICHARDS and GREENE, BB., concurred.

The following was the order made:—

Ordered; that, upon the said plaintiff entering into a bond to the defendant, in the sum of £150, conditioned for the payment of any loss the defendant may sustain by reason of the said bills of exchange not being now forthcoming, the defendant hereby consenting to accept same as an indemnity for the loss of such bills, the said defences to the first and second paragraphs be set aside, and plaintiff be at liberty to mark judgment thereon: such bond to be given to defendant within ten days from the date hereof; and in default, that this motion do stand refused with costs; and if said bond be given, no costs of this motion on either side, or of setting aside said defences.

T. T. 1857.
Common Pleas.

# MIDLAND GREAT WESTERN RAILWAY COMPANY
v.
# BENSON.

*(Common Pleas.)*

*June 2.*

*B., a merchant residing in Ireland, delivered a lot of butter to the M. G. W. Railway Company, and obtained from their local agent a receipt expressing that the butter was consigned to K. of Liverpool, and was to be forwarded by the Company to Dublin. B. sent the receipt to K., and got from him an advance of £40. B. subsequently, on a representation to the Company in Dublin that the butter was his absolute property, prevailed on them to re-deliver it to him. They subsequently paid to K., under threat of legal proceedings, the amount which he had advanced to B.—Held, that the Company were entitled to recover this amount from B., as money paid for his use.*

This was an action for money paid by the plaintiffs for the use of the defendant. The defendant pleaded a denial of the cause of action. At the trial of the action, in the Consolidated Nisi Prius Court, before Keogh, J., it appeared that the defendant, who is a merchant residing at Boyle, on the 19th of September 1856, delivered to the Company's agent, at Carrickmahon, a lot consisting of thirteen firkins of butter, for transmission to Liverpool, by Royal Canal and Steamer, and got a receipt for the goods in the following form, viz.:—

"Midland Great Western Railway and Royal Canal Company.

"No. 978. "Royal Canal Docks, North Wall,
"19th day of September 1856.

"Received from F. Benson thirteen firkins of butter, consigned "to C. Kelly of Liverpool, which we promise to forward to the "Company's store at Dublin.

"(Signed) for the Company,
"[Signature of Agent.]

"This receipt to be produced on claiming the goods."

On the 20th of September, the defendant wrote to Kelly, who was his factor in Liverpool, inclosing the Canal receipt, and Kelly subsequently remitted, on account of the butter, £40, inclosing in the same letter an account of sales of a former lot of butter. It appeared that the defendant was dissatisfied with the amount so realised, and wanted to appropriate the £40 in satisfaction of the loss, which he imputed to his agent's neglect of duty. He accordingly came up to Dublin, in order to stop the butter, and he

succeeded, by means of representing that the butter was his absolute property, in inducing the Company's servants to re-deliver it to him. The Company were not at this time aware of the transaction with Kelly. Subsequently, being threatened by him with legal proceedings, they paid him the sum of £40, which he had advanced on the butter, and then brought this action against the defendant for the like amount, as for money paid for his use.

Counsel for the defendant called on the Judge to nonsuit the plaintiffs, or to direct a verdict for him, upon the ground that the payment was voluntary; but this he refused to do, and the jury found for the plaintiffs, for the full amount claimed. A conditional order having been obtained to set aside this verdict, for misdirection,

*J. Clarke* (with whom was *E. D. Latouche*) showed cause against the conditional order.

The plaintiffs have a right to recover the £40, as money paid for the defendant's use: *Brown* v. *Hodgson* (*a*). A promise to reimburse the plaintiffs may be implied from the fact of the defendant's receipt of the goods: *Spencer* v. *Parry* (*b*); *Lewis* v. *Campbell* (*c*); *Bryans* v. *Nix* (*d*). *Sills* v. *Laing* (*e*) is distingishable.

*R. Armstrong* and *Harkan*, contra.

This action may be held not to be maintainable, without it being necessary to overrule any of the cases already cited. A main ground of distinction is this, that here the defendant was the original owner of the butter. It is a fallacy to say that Kelly had a right of action against the Company. The principle upon which *Brown* v. *Hodgson* proceeded was, that Hodgson had placed the plaintiff in a position of liability to third persons. Here no property vested in Kelly: *Coates* v. *Chaplin* (*f*). The Company were total strangers to the £40 transaction. They had no notice of that fact. There was no privity between them and the

(*a*) 4 Taunt. 189.
(*b*) 3 Ad. & El. 338.
(*c*) 8 C. B. 545–7.
(*d*) 4 M. & W. 775.
(*e*) 4 Camp. 81.
(*f*) 3 Q. B. 483.

T. T. 1857.
*Common Pleas.*
M. G. W. RAILWAY v. BENSON.

consignee. This action is maintainable only on a promi
or implied, on the part of the defendant, to the Company.
promise can be implied here, as the defendant manifestly
to keep both money and goods until he made a settler
Kelly. At all events, a neglect or breach of duty by
pany would disentitle them to bring such an actio
present: *Pitcher* v. *Bailey* (a); *Capp* v. *Topham* (b).
was the duty of the Company not to have delivered
without the production of the receipt. The very case
Company make is, that it was their duty to have deliv
to Kelly.

*Latouche* was not called on to reply.

MONAHAN, C. J.

We are all satisfied that the case of *Brown* v. *Hodgson*
decided, and that the present case cannot be distinguishe
ciple from that. With respect to the alleged neglect on
of the Company; if the defendant had not transmitted the
Kelly, and got £40 on its security, he would have bee
entitled to get back the goods. Now, it appears that
came for the goods, he represented to the Company that
his, under circumstances which, if true, would have entitl
get them back; consequently there was no neglect upon tl
the Company in thus parting with the possession of the go

Therefore, the law will imply that the defendant pr
repay the Company the money, which they were bound
Kelly, who was in a position to maintain against them an
the £40; and so, upon the authority of *Brown* v. *Hodgso*
of opinion that this verdict must stand.

Cause shown allowed

(a) 8 East, 171. (b) 6 East, 3

M. T. 1857.
*Common Pleas.*

## KELLY *v.* SLATER.

*Nov.* 24.

A plea of payment of money into Court, pursuant to the Common Law Procedure Amendment Act, s. 75, will not be allowed to be pleaded along with a plea in bar to the same cause of action.

The plea of payment into Court must be either the sole defence on the record, or it must be confined to such portion of the cause of action as is not covered by any other defence.

DEVITT applied for liberty to plead, in answer to a summons and plaint for breaking and entering the plaintiff's dwelling-house, &c., two defences to the same cause of action; first, a plea of justification, and secondly, a plea of payment into Court. The 58th section of the Common Law Procedure Act allows the defence of payment to be pleaded, as of course, along with others denying the cause of action; and the allowance of a plea of payment into Court involves a similar inconsistency. The objection which may be raised to this, arising from the plaintiff not being able to tax his costs of suit upon drawing the money out of Court, where there is another plea denying the cause of action, is answered by the case of *Cauty* v. *Gill* (*a*). In the unreported case of *Fitzpatrick* v. *The Great Southern and Western Railway Company* (M. T. 1857), the Court of Exchequer allowed the defendant to plead, first, denial of cause of action; secondly, leave and licence; and thirdly, payment into Court.

*Concannon*, contra.

This motion should be refused. The 58th section has no application to the present case. The fundamental distinction between a plea of payment, and of payment into Court, is this, that one is a plea in bar, which denies that the plaintiff, at the time of action brought, had a cause of action, and consequently it may properly be pleaded with other pleas in bar; but the plea of payment into Court is a plea to the further maintenance of the action, and therefore admits the existence of a cause of action at the time of the commencement of the suit. Such a plea would be manifestly inconsistent with other pleas denying the cause of action. It would be impossible for the plaintiff to avail himself of the 77th section of the Common

(*a*) 4 M. & G. 907.

M. T. 1857.
*Common Pleas.*
KELLY
*v.*
SLATER.

Law Procedure Act, which entitles him to draw the money out of Court in satisfaction of his claim, and to recover the costs of suit, in case there were no plea in bar to be disposed of. In *Dearle* v. *Barrett* (*a*), the Court refused to allow pleas of tender and of payment into Court to be pleaded together. The rule of Court in England, then in force, respecting the payment of money into Court, corresponded with the provisions of the present Procedure Act. So also, in *O'Brien* v. *Clement* (*b*), the defendant was not allowed to plead, to an action for libel, a plea of not guilty, and a plea of an apology, and payment into Court of amends; and the Court asked how, in case the defendant succeeded upon the plea of not guilty, the judgment was to be entered, because if he were not guilty he ought not to have paid the money into Court: *Thompson* v. *Jackson* (*c*); *Archbold's Practice*, ed. 1856, p. 249; *Pearson's Common Law Procedure Act*, p. 31.

*Devitt*, in reply.

The present case rests upon the construction of section 58. The plea of payment there mentioned ought not to be restricted to payment before action.—[MONAHAN, C. J. What is the plaintiff to do, if he is willing to accept the shilling, which you propose to pay into Court, with the costs of the motion?]—The order can be specially framed to meet the case.—[BALL, J. The order of the Court of Exchequer, to which you refer, was made *ex parte*.]—The 57th section gives jurisdiction to allow double pleas, however inconsistent. *Fischer* v. *Aide* (*d*) is an authority to show that a plea of payment into Court may be pleaded along with a plea in bar to the same cause of action, though, in consequence of an informality, the plaintiff was held entitled to nominal damages: *Twemlow* v. *Askey* (*e*).

MONAHAN, C. J.

In that case the pleas of *non assumpsit*, and of payment into

(*a*) 2 Ad. & Ell. 82.
(*b*) 15 M. & W. 435; S. C., 3 Dowl. & L. 676.
(*c*) 1 M. & G. 242.
(*d*) 3 M. & W. 486.
(*e*) 3 M. & W. 497.

M. T. 1857.
*Common Pleas.*

KELLY
*v.*
SLATER.

Court, were pleaded to separate parts of the declaration. So here, if you confined your justification to part of the cause of action, you could pay money into Court, in answer to the part not justified. Your suggestion regarding our not making the order without special terms shows that it cannot be made. There is no precedent or authority for this, and the application must be refused with costs.

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## DUBLIN AND KINGSTOWN RAILWAY COMPANY
*v.*
## BRADFORD.

E. T. 1857.
*April* 20, 21, 27.
*May* 7.

Under a deed of conveyance by the Commissioners of the Incumbered Estates Court, certain lands and premises therein described as demised under certain leases were conveyed to the purchaser, and the deed contained the following exception:—"excepting also that portion thereof, containing 12 perches and 3¼ yards, or thereabouts, traversed by the Dublin and Kingstown Railway" (reserving a right of way), "situate in the town of Kingstown, parish of Monkstown, and county of Dublin, and described in the annexed map, with the appurtenances." The map included a portion of the 12 perches and 3¼ yards.—*Held*, that there being, irrespective of the map, an adequate description of what was intended to pass under the deed, the subsequent description appearing on the face of the map, being at variance with the former description, might be rejected, on the principle "*falsa demonstratio non nocet*," and that it was the duty of the Judge to admit evidence *dehors* the deed, for the purpose of identifying the particular portion described in the words of the deed.

[*Errington* v. *Rorke* acted upon.]

BILL OF EXCEPTIONS.—This was an action of ejectment on the title, tried before MONAHAN, C. J., at the Nisi Prius Sittings after last Trinity Term, and brought to recover the possession of 12 perches and 3¼ yards of land, situate in the parish of Monkstown and county of Dublin.

The plaintiffs gave in evidence an indenture of lease, dated the 10th of March 1829, whereby Lord De Vesci demised to Edward Armstrong, his executors, administrators and assigns, for the term of ninety-nine years, an undivided moiety of the dwelling-house and premises then in the possession of the latter, containing 67 feet in front and 327 in depth, and bounded by certain abuttals therein described, subject to the yearly rent of £20 sterling. They also proved another lease of the other undivided moiety of the same premises, made to Edward Armstrong, his executors, administrators

E. T. 1857.
*Common Pleas.*
D. & K. RAILWAY *v.* BRADFORD.

and assigns, by Lord Longford and others, for the same term and at the same yearly rent. It was admitted on both sides that the Railway mentioned as one of the boundaries in those deeds was an old tramway that had been since removed. A warrant, under the seal of the Dublin and Kingstown Railway Company, directed to the Sheriff of the county of Dublin, dated 24th June 1836, was also given in evidence, reciting the intention of the Company to take part of the premises comprised in the above leases, and requiring the Sheriff to empanel a jury to assess the sums to be paid for the purchase of the lands so intended to be taken by the Company; and they also proved an inquisition made accordingly, dated the 11th of July 1836, by which the jury found that, under the above leases, the premises marked No. 4 on a map attached to the inquisition, and containing 12 perches and 3¼ yards, had been so demised; and further, that a sum of £40 purchase-money and six pence damages ought to be paid by the Company to Edward Armstrong for the premises marked No. 4; and they also proved a deed poll executed to the Company by Edward Armstrong, whereby he granted to them the above piece of ground, containing 12 perches and 3¼ yards, and marked No. 4 on the map annexed to the inquisition, for all his estate therein. This conveyance was not registered. The plaintiffs then proved that they had, under the latter deed, entered into possession, and erected the southern boundary wall of the Railway across the northern extremity of the lot of ground taken under the inquisition, and that there were on the northern side of that wall, within the Railway, 70 superficial feet, and at the southern side of the wall, outside the Railway, about 11 perches and 25 yards of this piece of ground.

The defendant admitted that he was in possession of a portion of the premises marked No. 4 on the inquisition map, situated outside the southern wall of the Railway, and admitted demand of possession, and refusal by him, and founded his title upon a deed of conveyance, bearing date the 7th of July 1852, and executed to him by the Commissioners of the Incumbered Estates Court, by which, after reciting the leases of 1829, they granted to the defendant the premises comprised in those leases, "except

"as therein is excepted, and excepting also that portion thereof "containing 12 perches and 3¼ yards, or thereabouts, and traversed "by the Dublin and Kingstown Railway; and excepting always "unto the Commissioners of Kingstown Harbour free liberty "of ingress, egress and regress through and along that portion "of the said premises upon the map hereunto annexed, marked "as No. 4, for the purpose of repairing and cleansing their sewer, "situate in the town of Kingstown, parish of Monkstown, and "county of Dublin, and described in the annexed map, with "the appurtenances," for the residue of the term of ninety-nine years, subject to the rents and covenants contained in the leases of 1829. A memorial of this deed was registered in June 1852. An agreement between John Armstrong and the Commissioners of Kingstown Harbour was also proved, entitling them to a right of way through the land in his possession. It was admitted that the portion of the premises lying outside, to the south of the Railway boundary wall, had been for several years waste and uninclosed, and also that the Harbour Commissioners had built two walls, forming the eastern and western boundaries of the land sought to be recovered, and other premises.

At the close of the trial, his Lordship informed the jury, first, that according to the true construction of the deed of 1852, the premises comprised in and delineated on the map annexed thereto were thereby conveyed to the defendant, although they included a portion of the premises taken by the plaintiffs under the inquisition and deed of 1836.

Secondly, that the conveyance of 1852 was valid and effectual, for the purpose of conveying to the defendant the premises thereby expressed to be conveyed, and that the defendant was entitled to hold them as against the plaintiffs, and that the latter were not entitled to the premises expressed to be conveyed to the defendant by the deed of 1852, or to any part thereof.

Thirdly, that upon the evidence and admissions of plaintiffs' Counsel, the premises sought to be recovered by the plaintiffs were comprised in and constituted part of the lot No. 4, on the map attached to the conveyance of 1852; and therefore his Lordship directed

E. T. 1857.
*Common Pleas.*
D. & K. RAILWAY v. BRADFORD.

a verdict for the defendant. To these directions the plaintiffs' Counsel took the following exceptions:—First, as to the first direction; requiring his Lordship to inform the jury that, under the deed of 1852, the Commissioners did except from the grant thereby made to the defendant that portion of the premises taken by the plaintiffs under the inquisition and deed of 1836, containing 12 perches and 3¼ yards, or thereabouts, and did not convey to the defendant any portion of those premises, although a portion of them was included in the map attached to the conveyance of 1852.

Secondly, as to the second direction; requiring his Lordship to inform the jury that, even although the conveyance of 1852 purported to convey to the defendant the premises sought to be recovered by the plaintiffs, yet that it could not have that effect, the same having legally vested in the plaintiffs under the inquisition and deed of 1836, notwithstanding the non-registry of the latter deed, and the due registry of the former.

Thirdly, as to the third direction; requiring his Lordship to direct a verdict for the plaintiffs, it being a fact admitted by the defendant that the premises sought to be recovered by the plaintiffs formed portion of the premises taken by the plaintiffs under the inquisition and deed of 1836; but his Lordship refused to alter his original charge.

*Shaw*, in support of the exceptions.

The map clearly contains more than the Commissioners intended to convey, there being a clear intention to except the portion originally taken by the Company. A conveyance is sometimes capable of a two-fold construction: *Solly* v. *Forbes* (*a*); and the intent of the parties is to guide the Court: *Goodtitle* v. *Bayley* (*b*). Words in a deed, which appear to be evidently repugnant to the other parts of it, and to the general intention of the parties, will be rejected as insensible: *Smith* v. *Parkhurst* (*c*). Of two irreconcileable constructions in a deed, the first if sufficient will stand, and the

(*a*) 2 Bro. & Bing. 38. (*b*) Cowp. 600.
(*c*) 3 Atk. 135; S. C., affirmed on appeal, 6 Bro., P. C., 351.

latter will be rejected: *Shep. Touch.*, p. 88; *Llewellen* v. *Jersey* (*a*); *Burton on Real Prop.*, p. 512. This map cannot prevail against clear words, which is the manner in which the Act requires the Incumbered Estates Commissioners to describe the property conveyed (12 & 13 *Vic.*, c. 77, s. 24); although in cases of partition a map is to be prepared (s. 45). If the matter misdescribed appear first in the instrument, the grant will fail altogether; but it is not so where the misdescription is not placed first: *Burton on Real Prop.*, pp. 561, 562; *Dowtie's case* (*b*); *Plowd.*, p. 191; *Doe* d. *Ashford* v. *Bowes* (*c*); *Roe* v. *Vernon* (*d*); *Shep. Touch. (Preston)*, p. 247; *Furl. Land. & Ten.*, p. 387; *Doe* d. *White* v. *Osborne* (*e*). The word "traversed" means "crossed;" but even supposing it an inapt expression, the intention of the Commissioners is to be gathered from the extent of their jurisdiction: *Dwar. on Stat.*, pp. 492, 594, 621; *Doe* d. *Smith* v. *Galloway* (*f*). He also cited *Bacon's Maxims*, p. 3; *Winter* v. *Winter* (*g*).

*Henderson* (with him *R. Armstrong*), in support of the verdict. The verbal description being indefinite, resort must be had to the map to ascertain the meaning; but the other proceedings, viz., the inquisition, &c., cannot be taken into account to explain the words of the conveyance, being extrinsic: *Barton* v. *Dobbs* (*h*). The rule of construction contended for by the other side has been sometimes departed from: *Doddington's case* (*i*); *Bozoun's case* (*k*); *Dyer*, p. 80; *Walsh* v. *Trevanion* (*l*). They also cited *Stukeley* v. *Butler* (*m*).

*Rogers*, in reply, cited *Shep. Touch.*, pp. 100, 247, 250.

*Cur. ad. vult.*

(*a*) 11 M. & W. 189.
(*b*) 3 Rep. 10, *a*.
(*c*) 3 B. & Ad. 457.
(*d*) 5 E. 51.
(*e*) 4 Jur. 941.
(*f*) 5 B. & Ad. 43; S. C., 2 Nev. & Man. 240.
(*g*) 5 Hare, 306.
(*h*) 10 C. B. 261.
(*i*) 2 Rep. 33, *a*.
(*k*) 4 Rep. 35, *a*.
(*l*) 15 Q. B. 734.
(*m*) Hob. 171.

E. T. 1857.
*Common Pleas.*
D. & K. RAILWAY *v.* BRADFORD.
*May* 7.

MONAHAN, C. J., now delivered the judgment of the Court.

This is a case of considerable difficulty. The action was brought by the Dublin and Kingstown Railway Company, to recover from the defendant a certain portion of land; and they claim title to this property under proceedings taken by them at the time of the construction of the Railway, and this title they allege to be founded partly upon a conveyance and partly upon an inquisition. There can be no doubt but that they do show a title to some ten or twelve perches of land, but the question is, whether they can recover upon this title against the defendant? The defendant's case is, that he purchased this lot of ground in the Incumbered Estates Court, and the question then arises, whether the Commissioners of that Court have by their conveyance given him a valid title as against the claim of the Railway Company? Two questions were raised at the trial; first, whether, upon the true construction of the conveyance to Bradford, this particular portion of land was conveyed to him? and secondly, whether, if this land was conveyed to him by the Commissioners (and this was the chief question at the trial), they had power, for the purpose of paying the debts of Armstrong, to sell to Bradford a portion of land, the property of the Railway Company? Upon both of these points, I was of opinion at the trial that there should be a verdict against the Railway Company, upon the ground that this portion of land had been actually conveyed to Bradford. There can be no doubt but that, at the time of the sale in the Incumbered Estates Court, both Bradford and the Commissioners were under the impression that this portion of land was the subject-matter of the conveyance, and that the property of the Company lay altogether within the walls of the Railway, the portion which the Commissioners sold to Bradford being outside the walls of the Railway. Still the question remained, what was the true construction of the deed, and not what did parties imagine at the time. I was of opinion at the trial that the true construction was what Bradford insisted upon, and that the Commissioners had, under the Act, power to convey to him this property. It now becomes necessary that we should rule both these points; and first, as to the construction of the deed, we have to consider the following

facts:—The property in question, which was situated near the town of Kingstown, had been originally demised by two leases, each comprising an undivided moiety, to one Armstrong, in the year 1829; and the description of what was conveyed by the Commissioners to Bradford was as follows:—"All that and those the "said two undivided moieties, &c., except as in said leases excepted, "and excepting also that portion thereof containing 12 perches and "3¼ yards, or thereabouts, thereof, traversed by the Dublin and "Kingstown Railway, excepting always to the Commissioners of "Kingstown free liberty of ingress, &c., situate in the town of "Kingstown, parish of Monkstown and county of Dublin, and "described in the annexed map, with the appurtenances." There can be no doubt that the meaning of these words is, that the premises conveyed to Bradford are described in the map annexed to the conveyance; and the question therefore is, what is comprised within the exception, or what would be the effect of a lease having an exception in the same words? for the effect would be the same in both cases.

It is a rule of construction that if the granting part of a deed be clear and explicit, and the excepting part be not so, the latter cannot derogate from the effect of the former.

This is the rule of law in such cases; it admits of no doubt, and Counsel on both sides were fully agreed as to that point; but the difficulty was, the application of that rule to the facts of this case, arising chiefly from this circumstance, that the greater part of this portion of land, comprising twelve perches or thereabouts, and originally in the possession of the Railway Company, was outside the limits of the map annexed to the conveyance. This rule of construction is laid down in *Shep. Touch.*, p. 247, and in the case of *Llewellen* v. *Jersey* (*a*); and I could refer to other late decisions upon the subject, but it is unnecessary to do so; for I need only state the rule of law, and it is this: that as soon as there is an adequate definition, with sufficient certainty of what is intended to pass under a deed, any subsequent erroneous addition will not vitiate the deed. *Falsa demonstratio non nocet.* The question

(*a*) 11 M. & W. 189.

E. T. 1857.
*Common Pleas.*
D. & K. RAILWAY *v.* BRADFORD.

therefore is, whether, irrespective of this map, there be an adequate and sufficient description of what was intended to be excepted from what was conveyed by this deed? I confess that during the argument of this case, and since, my opinion has fluctuated considerably; but nevertheless, after the most careful consideration of the case, we have all come to the conclusion with little doubt, although we consider the case to be one of considerable difficulty, that there is, irrespective of the map, a sufficient description of what was intended to pass under the deed, and that it depends altogether on the words "that portion thereof containing 12 perches and 3¼ "yards, or thereabouts, traversed by the Dublin and Kingstown Rail- "way;" for we are of opinion that it must be inferred from the perusal of the deed itself, without any extraneous evidence of the fact, that there must have been some definite portion of the premises set apart, not perhaps by any actual boundary, but by survey or otherwise, supposed to contain 12 perches and 3¼ yards, and this portion must be taken to be traversed by the Railway. With respect to the word "traversed," it has no legal definite meaning; it may mean that that portion is actually covered by the Railway; or it may mean that the Railway passes through it, a portion of it being outside the limits of the Railway; and therefore it is impossible to say, *a priori*, whether this land was inside or outside the limits of the Railway. But inasmuch as we find words referring to a portion of land containing a certain number of perches and yards, we are of opinion that it is the duty of the Judge and jury to ascertain, from evidence *dehors* the deed, what that portion of ground is which is supposed to contain that particular quantity of land: for the evidence is clear upon this subject, that, although at the time of the conveyance by the Commissioners, this portion of land was not actually separated from the rest, still that, upon the occasion of the purchase made by the Railway Company, a portion of 12 perches and 3¼ yards was in some way set apart from the remainder of Armstrong's premises, and traversed by the Railway; a part of this lot being within, and another part outside, the limits of the Railway. By saying that lot was set apart, I do not mean to say that there was an actual boundary, but that a division was made and ascertained in some way that we cannot now discover. We

are, therefore, of opinion that there was evidence to show the existence of such a portion of land, corresponding with the description in the deed, and that it was traversed by the Railway. We think that the deed contains a sufficiently adequate description of the premises to bring this case within the rule laid down in *Llewellen* v. *Jersey;* and that the words "described in the annexed map" are to be regarded as the *falsa demonstratio*, and that therefore they are not to be considered as the operative part of the conveyance. Therefore the first exception must be allowed, and a *venire de novo* awarded. As to the second exception, we think it must be overruled, on the authority of *Errington* v. *Rorke;* and that the third exception must be allowed.

*Venire de novo.*

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M. T. 1856.
*Nov.* 24, 25.
H. T. 1857.
*Jan.* 18, 19.

## DELACHEROIS *v.* DELACHEROIS.

Lands once severed from a manor cannot be re-annexed thereto by purchase, so as to pass under a previous devise of the manor.

*Semble*—They may be so re-annexed by escheat.

*Semble*—The rents and services may be re-annexed by purchase.

BILL OF EXCEPTIONS.—This was an action of ejectment upon the title, tried before Mr. Justice BALL, at the Summer Assizes 1856, for the county of Down, and was brought to recover the possession of the lands of Ballyhaise. The facts were as follows:—In the year 1836 (and before the passing of the Wills Act), Daniel Delacherois, deceased, made his will, bearing date the 3rd of March, by which he devised all his real estates in the county of Down, or elsewhere, to two trustees and their heirs, in trust for his sister Mary Delacherois, for life, with power for her to appoint the same to the children of Samuel Delacherois, the testator's brother, for life, with remainders to the first and other sons of such children, in tail. Subsequently to the date of this will, the testator Daniel Delacherois purchased the lands which were the subject-matter of the present action, and which were conveyed to him by a deed bearing date the 1st of March 1842; whereby, in consideration of the sum of £7000, J. H.

M. T. 1856.
*Common Pleas.*
DELACHEROIS
*v.*
DELACHEROIS

Bradshaw conveyed the same to the testator and his heirs. Under the latter deed it appeared that the lands in question were liable to a chief rent of £2 per annum, and the conveyance of the land was subject to that rent. The testator died on 1st October 1850. Mary Delacherois entered into possession as tenant for life, and by her will, bearing date the 4th of June 1852, she exercised the power of appointment created by the testator's will, in favour of the defendant and his issue. The plaintiff in the present action was the eldest son of Samuel Delacherois, the testator's brother, and the defendant was his second son. The latter entered into possession after the death of Mary Delacherois. The plaintiff's case at the trial chiefly rested upon the above facts, which were not disputed by the other side. The defendant relied upon the following facts, viz. :—That the lands in question had formed a portion of the manor of Donaghadee, and that the testator, at the time of making his will, was lord of the manor; and that the language of the will was sufficient to pass the manor; and that he having subsequently purchased these lands, which had been part and parcel of the manor, they became thereby re-annexed to the manor, and passed under his will as parcel of such. To sustain this case, the defendant gave in evidence a patent of the reign of *Car.* 1, dated 1625, and made to Lord Viscount Montgomery, under which the manor of Donaghadee was created, with power of infeudation, in fee-simple or fee-tail, to be held of Lord Montgomery, notwithstanding the Statute of *Quia Emptores.* He also gave in evidence several deeds and wills, under which he deduced the testator's title to this manor, and he examined several witnesses to prove the holding of a Manor Court, the appointment of seneschals from time to time, and the attendance of the tenants of Ballyhaise as jurors at the Manor Court. He also proved that Daniel Delacherois had occupied from 80 to 100 acres of demesne lands, and that there was an old castle of Donaghadee. At the close of the defendant's case, his Counsel, who sought to establish the existence of a manor, called upon the learned Judge to direct the jury to find for the defendant, upon the authority of the following passage from 2 *Shep. Touch.* (*Preston*):—"If there be lord and "tenant, and the lord purchase the tenancy, by this means the "services are released, and extinct at law, and the lands become

"parcel of the manor, and pass under that denomination, and may "pass inclusively with the manor, by a will made prior to the pur-"chase of the tenancy. So if the tenant purchase the services, they "are extinguished in the tenancy, if he have equal estates in the "tenancy and services." The plaintiff, on the other hand, contended that the lands, having been once disconnected from the manor, could not be re-annexed thereto by any subsequent purchase, upon the authority of 12 *Mod.* p. 138, in which it is laid down that "a ten-"ancy escheated to the lord becomes part of the manor; but if the "lord purchase part, it is only holden of the manor, and not part of "it, but the rent and services are part."

The learned Judge told the jury that, if they believed the evidence, they should find a verdict for the plaintiff. To this direction the defendant's Counsel excepted, and called upon the learned Judge to direct a verdict for the defendant upon the evidence, which his Lordship refused to do.

This case was argued in Michaelmas Term 1856, and Hilary Term 1857.

*Hugh Law* (with him *Gerald Fitzgibbon, Lynch, Joy* and *Robert Andrews*), in support of the exceptions, cited 2 *Shep. Touch.* (*Preston*) *Rele.* p. 334; *Bol. Eccl. Law*, pp. 1476, 1479; 33 *H.* 8. sess. 1, c. 8, s. 3; sess. 2, c. 5; 10 *Car.* 1. sess. 1, c. 3 *(Ir)*; and sess. 3, c. 2 *(Ir.)*; 15 *Car.* 1, c. 6 *(Ir.)*; 10 *W.* 3, c. 8, ss. 15, 16; 27 *G.* 3, c. 34; 27 *G.* 3, c. 35, s. 18; 5 & 6 *Vic.*, c. 81; 25 *G.* 3, c. 44, ss. 1, 2, 4, 10; 27 *G.* 3, c. 22, s. 4; 7 & 8 *G.* 4, c. 56; *Scriven on Cop.* p, 1, p. 715; *Com. Dig.*, *Copyhold*, q, 1; *Coke's Copyholder*, s. 31; 2 *Woodeson*, pp. 38, 39; *Williams' Real Property*, pp. 91, 92, 96; *Cru. Dig.*, pp. 29, 34; *Wright on Tenures*, pp. 159, 201, 202; *Perkins on Conv.*, pp 635, 638, 670, 996; 2 *Watk. on Copyholds*, pp. 8, 15; *Sir Moyle Finch's case* (*a*): *Lib. Feud.*, cited in 1 *Cru. Dig.*, p. 1; *Turner's Cop.*, s. 45; *Dalrymple on Feuds*, p. 280; *Sullivan's Lectures on Feudal Law*, p. 185; *Co. Lit.* 58 *b*, 59 *a*; 1 *Hallam's Middle Ages*, p. 237; 1 *Cru. Dig.*, *Tenure*, c. 3, ss. 5, 6, 7; 1 *Furl. Lan. & Ten.* ss. 11 to 13, citing *Abbot of Barking's case*, 10 *H.* 7, 23 *a*, 27 *H.* 8, 26, *pl.* 5; *Lit.* 140; *Co. Lit.* 98 *b*;

(*a*) 6 Rep. 64 *a*.

M. T. 1856.
*Common Pleas.*
DELACHEROIS
*v.*
DELACHEROIS

1 *Shep. Touch.*, pp. 86, 88, 91, 334, 439; *Chad* v. *Tilsed* (*a*); *Jenkins* v. *Harvey* (*b*); *Bradley* v. *The Pilots of Newcastle* (*c*); *Doe* d. *Kinglake* v. *Bevis* (*d*); *Duke of Beaufort* v. *Mayor of Swansea* (*e*); *Doe* d. *Beck* v. *Heakin* (*f*); 1 *Watk. on Copyhold*, p. 1; *Rex* v. *Wilson* (*g*); *Dimes* v. *Arden* (*h*); *Rex* v. *Stafferton* (*i*); *Brown* v. *Goldsmith* (*k*); *Sir R. Acton's case* (*l*); *Pell* v. *Towers* (*m*); *Verschoyle* v. *Perkins* (*n*); *Bac. Abr.*, *Tenure*, B, *Rent*, D; *Co. Litt.*, ss. 213, 215; *Com. Dig.*, *Rent*, B; *Porter* v. *French* (*o*); *Harrington* v. *Wyse* (*p*); *Morrice* v. *Antrobus* (*q*); *Clark* v. *Coughlan* (*r*); *Bac. Abr.*, *Lease*, E, 7; *Vin. Abr.*, *Reservation*, L, 2, *pl.* 3, and *Release*, B, 2; *Gilbert on Rents*, p. 30; *Co. Lit.*, 65 *a*, 150 *a*, 151 *a*, 148 *b*; *Earl of Derby* v. *Taylor* (*s*); *Burgess* v. *Wheate* (*t*); 2 *Inst.*, pp. 292, 295; *Wright's Tenures*, pp. 201, 202; *Com. Dig.*, *Surrender*, D; 3 *Preston Conv.*, p. 26; *Gilbert on Rents*, pp. 149, 183; *Gifford* v. *Hutton* (*u*); *Cresswell's case* (*v*); *Montague's case* (*w*); *Bingham* v. *Woodgate* (*x*); *Brunker* v. *Coke* (*y*); *Anon.* (*z*); *Vin. Abr.*, *Extinguishment*, C, 1, E, 2; *Manor*, E & N, *Release*, K, 3.

*Vance* (with him *Brewster*, *Napier*, and *T. O'Hagan*), for the plaintiff, cited *Roe* v. *Wegg* (*aa*); *Salk.*, p. 238; 1 *Furl. L. & T.*, p. 9; *Walsh* v. *Feely* (*bb*); *Com. Dig.*, *Copyhold*, 2, *pl.* 3; *Townley* v. *Gibson* (*cc*); *Doe* v. *Davison* (*dd*); *Revell* v. *Jodrell* (*ee*); *Bradshaw*

(*a*) 2 Bro. & Bing. 403.
(*b*) 1 Cr., M. & R. 877; S. C. 5 Tyrwh. 326.
(*c*) 2 Ell. & Bl. 427.
(*d*) 7 C. B. 456.
(*e*) 3 Exch. 425.
(*f*) 6 Ad. & Ell. 495.
(*g*) 5 Man. & Ryl. 153, *note*.
(*h*) 6 Nev. & Man. 499, *note*.
(*i*) 1 Bulst. 54.
(*k*) Sir F. Moore, 870.
(*l*) Dyer, 288.
(*m*) 2 Noy, 20.
(*n*) 13 Ir. Eq. Rep. 72.
(*o*) 9 Ir. Law Rep. 514, *per* Lefroy, B., p. 553.
(*p*) Cro. Eliz. 480.
(*q*) Hard. 326.
(*r*) 3 Ir. Law Rep. 427.
(*s*) 1 E. 502.
(*t*) 1 Eden, 127.
(*u*) Saville, 21.
(*v*) Sir F. Moore, 721.
(*w*) Ley. 63.
(*x*) 1 Russ. & Myl. 32.
(*y*) 11 Mod. 121; S.C., Holt, 246.
(*z*) 12 Mod. 138.
(*aa*) 6 T. R. 708.
(*bb*) 1 Jon. 413.
(*cc*) 2 T. R. 705.
(*dd*) 2 M. & S. 175, 183.
(*ee*) 2 T. R. 424.

v. *Lawson* (*a*); *Lemon* v. *Blackwell* (*b*); *Vin. Abr.*, *Copyhold*, F, and *Manor*, E; *Shep. Touch.*, pp. 75, 332; *Co. Lit.*, 280 *a*, 3, 6, 18 *a*, note; *Doe* v. *Huntingdon* (*c*); *Sir Moyle Finch's case* (*d*); *Goodright* v. *Forrester* (*e*); *Gilbert*, p. 288; *Verschoyle* v. *Perkins* (*f*).

*Cur. ad. vult.*

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E. T. 1857.
*May* 8.

MONAHAN, C. J.

This case comes before the Court upon a bill of exceptions. The action, which was tried before my Brother BALL, in which Nicholas Delacherois is plaintiff, and Daniel Delacherois defendant, is an ejectment, and has been brought to recover one-third part of the lands of Ballyhaise, in the county of Down. The plaintiff and defendant are brothers, and the plaintiff's case at the trial was this:—That in March 1842, a conveyance had been made to Daniel Delacherois, now deceased, of the lands in dispute, subject to a fee-farm rent of £2 per annum; that Daniel Delacherois had died, having been in possession up to the time of his death, and that the plaintiff was his nephew and heir-at-law; and these facts, viz., sesin in fee, receipt of rents and profits, death of the testator, and the fact of the plaintiff being his heir-at-law, were admitted. Upon the other hand, the defendant says:—"I claim "under the will of the same Daniel Delacherois, which was "executed several years before the conveyance of March 1842, "antecedent to the Wills Act, 1 *Vic.*, c. 26." Therefore the defendant, although a younger brother of the plaintiff, undertook to establish that the will, although prior to the conveyance, had the effect of passing this subsequently acquired fee-simple property.

There can be no doubt but that the will contained sufficiently wide terms to convey real estate, for it was not confined to any particular kind of property. The defendant was, therefore, put to prove his title, and the bill of exceptions sets forth a schedule of the several documents relied upon by him for that purpose. The

(*a*) 4 T. R. 443.
(*b*) Skin. 192.
(*c*) 4 E. 271.
(*d*) 6 Rep. 63.
(*e*) 8 E. 552.
(*f*) 13 Ir. Eq. Rep. 72.

E. T. 1857.
*Common Pleas.*
DELACHEROIS
*v.*
DELACHEROIS

first is a patent of the year 1625 (2 *Car.* 1), made to Hugh Viscount Montgomery: I need not go into the particulars of it; but in effect it grants to him, among other estates, the manor of Donaghadee, and the power of creating a manor.

As the decision of the Court does not at all depend upon the construction of this instrument, I will not state it more fully.

The next document is a patent of the year 1633 (13 *Car.* 1), made to Lord Mount-Alexander: it is unnecessary to go into the details of that instrument either. The defendant then deduces title, and shows that the property was portion of a manor created under one of these patents, and that this manor was vested in the testator at the time of the making of his will. Assuming that there was legal evidence of the existence of a manor, there is no doubt but that it was vested in the testator at that time. He next gave in evidence a fee-farm grant by the lord of the manor to a third person, at a yearly rent of £6; and it is for a third part of the lands comprised in that grant that the present ejectment is brought. The defendant then insists that, at the time of the conveyance of 1842, the estate of the tenant under the fee-farm grant had become vested, as to this third of it, in the grantor; and he contends that, at the time of the execution of the conveyance of these lands to the lord of the manor of Donaghadee, they were held in fee of that manor, under the lord of the manor, and that the effect of the conveyance was to make them part of the manor; and that being so, that as the manor had been devised by the previous will, *ergo* the devisee became entitled to them; and that they were not subsequently acquired property, but passed under the will. I feel much satisfaction that the party, if dissatisfied with our judgment, will have the opportunity of taking the case to the Court of Error, and that, before the argument, provision was made that the record should be so amended as that the question should be fairly brought before the Court of Appeal, and that the party cannot be turned round on any point of form, as possibly he might have been on the exceptions as originally prepared.

The case has been fully argued on both sides; the defendant contending, first, that there was in existence a manor prior to the

patent; and even if that were not so, that the patent created a manor, or contained a power to the grantee to create a manor; and it was then contended that this was so notwithstading the operation of the Statute of *Quia Emptores*, inasmuch as the Crown had power to dispense with that statute; and also that the fee-farm grant made by the lord of the manor, of what up to that time must be taken to have been a part of the demesne lands of the manor, was a conveyance of a fee-simple estate to the tenant, to be holden of the manor. The last proposition contended for by the defendant, and the only one upon which we intend to express an opinion, is this—that the conveyance made by the tenant to the lord of the manor had the effect of making these lands a part of the manor again; the other side contending that when these lands had once been demised to the tenant under the fee-farm grant, they could not again become a portion of the demesne lands of the manor, although conveyed in fee to the lord of the manor, except as far as being within the ambit of the manor, and subject to the rights of the Crown. This latter question is the only one upon which we think it necessary to give an opinion; for supposing, for argument sake, that there did exist a manor in the strictest sense of the term, and that these lands were held of the manor, and became vested in Mr. Bradshaw as tenant to the manor, holding under the lord of the manor, and that the severance of the rent made no difference, we are of opinion that the lord of the manor could not, by taking a conveyance of these lands to himself in fee, attach them again to the manor, so as to pass under a previous devise thereof; for although they may become a part of it for certain purposes, they do not become a portion of the demesne lands of the manor.

This case must be decided on the consideration of very ancient authorities; and it is well known that a manor consists of two things, first, demesne lands, and secondly, rents and services issuing out of the tenemental lands held of the same manor. As I have already stated, we do not enter into the question as to whether there was evidence of the existence of a manor granted by the Crown to Lord Montgomery, nor even if so, whether the Crown had a right to do so, under the Act of Settlement, nor whether the Crown

E. T. 1857.
*Common Pleas.*
DELACHEROIS
*v.*
DELACHEROIS

could dispense with the provisions of *Quia Emptores;* but assuming all the rest to be in favour of the defendant, we are of opinion that the deed of 1842 had not the effect of making these lands a part of the demesne lands of the manor, so as to pass under the previous will. The first authority upon this subject is *Lord Mountjoy's case*, although this was not the question actually decided.—[His Lordship stated the facts of the case.]—Lord *Coke* says that in that case, "as much was said as the wit of man could think or invent;" and this proposition was put forward—"If a "manor has been always let for £10, and afterwards a tenancy "escheats, yet it may be let for £10, and yet it may be argued "that this is not *verus et antiquus reditus*, for no rent was ever "reserved before out of the land escheated;" and when the Court came to consider this argument, they held that the lease in that case was not a valid lease, as not at the ancient rent, but including something which had not been originally reserved, and they say:—"As to the case of escheat of a tenancy, it was agreed for good law; "for the act of law or of God will not prejudice any one. But "if the lessor had purchased the tenancy it would be otherwise, "for that which is purchased is not parcel of the manor, because "he acquires it by his own act."

I am aware that that was not the point decided in that case; but we all know that the resolutions of the Judges in those times, though not exactly upon the questions before them, and the analogy drawn from these resolutions, were the foundations of their judgments, and that from the earliest times these resolutions were regarded as of authority, and made the grounds of subsequent decisions. The next case I shall refer to, in order to show that these resolutions have been so recognised, is *Holmes* v. *Hanby*, reported in *Sid.*, p. 284, and 2 *Keb.*, p. 28. It is reported differently in the two reports, but it is essentially the same case. In *Siderfin* it is thus stated; that if one who holds land of a manor be tenant in tail also of the manor, by his conveyance of the manor the land does not pass; and the reason was because there was no union of the two estates, one being fee-simple, and the other fee-tail; but that even if they had both been fee-simple, the conveyance

would not pass the lands, for that they should be part of the manor, which was not the case, there being a difference between lands escheated and lands purchased. The case in *Keble* is thus stated.—[His Lordship read the case.]—No doubt, there existed in that case the distinction between an estate tail and an estate in fee; but I refer to it chiefly as showing that the Court adopted the decision in *Lord Mountjoy's case*, as to the difference in effect between escheat and purchase.

The next case is *Temple* v. *Cook* (*a*).—[His Lordship stated the facts of that case.]—I chiefly refer to this case as a deduction from the general principle. There is another case, *Brunker* v. *Cooke* (*b*), and another *Anonymous case* (*c*). In the latter, Holt, C. J., says:—"Where a custom is that all lands held of that manor "shall pass by surrender and admittance, yet the lands may be "freehold, and the manner of conveyance is customary, inasmuch "as livery is not requisite:" and he said:—"The freeholds "themselves can never be parcel of the manor, but it is the "services." In the former case it was held (p. 121), that a devise of "all my lands, tenements and estate whatsoever, of which I "shall die possessed or invested at the time of my decease," will not pass an estate purchased after the making of the will; and in p. 130, Lord Holt supposes the following case:—"A has a "manor and makes his will, and devises this manor, and before "the death of the testator a tenancy escheats to the lord, and after "that the testator dies; the question is, whether the escheated "tenancy shall pass? And I hold that the tenancy that escheated "between the making of the will and the death of the testator "shall pass, because the manor is devised, and that is part of "it; for the tenancy is not devised as a distinct thing, but as part "of the whole which he could devise." From this it appears, although it may not be very easy to account for the distinction, that escheated lands do, and lands purchased do not, become part of the manor. In *The Queen* v. *The Duchess of Buccleugh* (*d*), several matters were resolved by the whole Court, showing that

(*a*) 3 Dyer, 656.
(*b*) 11 Mod. 106, 122.
(*c*) 11 Mod. 53.
(*d*) 6 Mod. 150.

E. T. 1857.
*Common Pleas.*
DELACHEROIS
*v.*
DELACHEROIS

the lord of a manor cannot, by any act of his, take the demesne lands of the manor out of the jurisdiction of the superior lord: and it was also resolved in these words:—"That lands once "severed from a manor can never again become parcel of it in "reality, but it may in reputation, as if lands, parcel of a manor, "be aliened away absolutely, and re-purchased, and an unity of "possession for a considerable time after." Again, in 12 *Mod.*, an anonymous case, Lord Holt says:—"A tenancy escheated to "the lord becomes part of the manor, but if the lord purchase "part, it is only holden of the manor, and not part of it; but "the rents and services are part." As against these cases, only one authority on the other side has been relied upon, *Vin. Abr.*, *Manor*, which might carry some weight if the case referred to bore out the proposition for which it is cited. This proposition is stated as follows:—"Lord, mesne and tenant. Mesne purchases "the seigniory, and afterwards purchases the tenancy, now the "tenancy is become parcel of the manor." But the case referred to does not at all support this proposition. The case referred to is *Hutton* v. *Gifford* (*a*).—[His Lordship stated the facts of the case.]—We were also referred to a passage in *Coke's Copyholds*, to the effect that if a lord of a manor purchase lands *out* of the manor, he cannot annex them to the manor; and it was assumed, as implied, that if he purchased lands that had been *within* the manor, he could have made the latter a portion of his manor; but I do not think that Lord *Coke* intended to suggest any such conclusion. We know that a manor must have been created time out of mind, and therefore if a lord of a manor convey away a part of the demesne lands, they cease to be part of the manor, although they continue subject to the superior lord as regards quit-rents and other services; and if he purchase the lands again, it is just the same as if he purchased lands quite distinct from the manor.

We cannot, therefore, upon a mere *dictum* of *Preston*,* overturn the authority of *Lord Mountjoy's case*, and the subsequent decisions in which it has been recognised; and we must, therefore, overrule the exceptions, upon the ground that the deed of 1842

(*a*) Sav. 21.

* 2 Pres. Shep. Touch. 334.

not re-annex to the manor the lands purchased under that rument.

BALL, JACKSON and KEOGH, JJ., concurred.

Exceptions overruled.

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## RUCKLEY *v.* KIERNAN.

*April* 18, 20.

In an action for libel, the summons and plaint alleged that R. (the plaintiff), who was the apprentice of V., an attorney in an action then pending, had made an affidavit, to be used on a motion in the latter action; and that K. (the defendant) had falsely and maliciously written a letter to V., stating that R. had in his affidavit disclosed a conversation that had taken place between R. and K., and had suppressed the truth and asserted what was false by his affidavit; with the following innuendo, "meaning thereby that the plaintiff had been guilty of perjury, by wilfully suppressing the truth and asserting falsehood," &c.

The defendant pleaded that he was attorney for the other party in the action in which the motion was pending, and that he, believing that the affidavit did not truly represent what had occurred, and contained reflections injurious to himself, wrote the letter in question, for the purpose of correcting the averments in the affidavit, and preventing its being used on the motion; and that he wrote the letter believing it to be true, and *bona fide*, and without malice in fact.—*Held* to be a privileged communication.

*Held also*, that although the defence did not in terms admit that the defendant believed the plaintiff to have been guilty of perjury, as complained of in the summons and plaint, it was sufficient upon demurrer.

*Held also*, that expressions used in excess of what the occasion warranted will not of themselves divest the communication of the privilege which it would otherwise possess, although they may be used as evidence of malice in fact.

s summons and plaint recited that a certain cause of *Briggs* v. *ler* had been pending in the Court of Exchequer, in which one n Vincent was attorney for the defendant, and that the plaintiff the apprentice of John Vincent, and had acted as such, and it became the duty of the plaintiff to state, in a certain affidavit n in that cause, certain matters of fact; and then proceeded to e that the plaintiff had sworn to the truth of certain matters is affidavit, and that the defendant falsely and maliciously e and published of the plaintiff a letter to John Vincent, in the wing words:—"I" (meaning the defendant) "was greatly prised this day at reading the affidavit Mr. Ruckley had the nerity to make in the above cause" (meaning the said cause *Briggs* v. *Butler*, and the said affidavit of the plaintiff in cause), "in which he" (meaning the plaintiff) "introduced " (meaning the defendant's) "private observations made to him,"

E. T. 1857.
*Common Pleas.*
RUCKLEY
*v.*
KIERNAN.

(meaning the plaintiff) "when he called here on your behalf; but "what I complain of most is, his" (meaning the plaintiff's) "wilful "suppression of the truth, as well as his" (meaning the plaintiff's) "assertion of what is not fact" (meaning thereby that the plaintiff had wilfully suppressed the truth and asserted what was false in his affidavit). The second paragraph of the summons and plaint stated that the defendant had falsely and maliciously written and published a certain letter addressed to John Vincent, one of the attorneys of this Court, setting forth the letter as in the first paragraph, and concluding with the following innuendo, "meaning thereby that the "plaintiff had been guilty of perjury, by the wilfully suppressing the "truth, and by the assertion of falsehood in the said affidavit sworn "by the plaintiff in the said cause of *Briggs* v. *Butler*." The defence, after stating that the libels complained of in the first and second paragraphs of the summons and plaint were one and the same, proceeded to aver that he, the defendant, was attorney for the plaintiff in the suit of *Briggs* v. *Butler*, and that at the time of the writing of the alleged libel, a motion was about to be made in that action on behalf of the defendant in that suit, notice of which motion had been given to the defendant in the present action, as attorney for Briggs, stating that such motion would be grounded in part upon the affidavit of the plaintiff in the present action. That the said affidavit contained statements purporting to be an account of an interview and conversation relative to the cause of *Briggs* v. *Butler*, between the plaintiff and defendant in the present action, and imputed to the latter that he had made a promise which he had broken. That the affidavit in question had been made and filed without the contents being known to John Vincent; and that the defendant, "believing that the said affidavit did not truly represent "what had occurred at the said interview between the said J. Ruckley "and the said defendant, and that the same contained an injurious "reflection upon the said defendant, in reference to his conduct as "such attorney of the said J. Briggs in said action, wrote and sent to "the said John Vincent, then being such attorney for the said G. V. "Butler, as aforesaid, and the master of the said John Ruckley, as in "the plaint mentioned, a letter, which letter contained the said alleged "libellous matter, and which writing and sending is the publication

"thereof in the plaint mentioned: and the said defendant so wrote and "sent the same in order to complain of and correct the said statements "contained in the said affidavit, and to prevent the said statements "from being used upon the said motion, the said defendant believing "that the said letter would have such effect: and the said defendant "avers that he so wrote and published the said alleged libellous "matter in the plaint mentioned, *bona fide*, believing the several "matters therein contained to be true, and without malice in fact, "against the plaintiff, as he lawfully might for the cause afore-"said." To this defence the plaintiff demurred, upon the grounds that it did not disclose any defence good in substance, and that the libel, the publication and defamatory sense of which is admitted, was not shown to have been written upon a privileged occasion. The ground of demurrer noted was, that the plea did not disclose a privileged occasion.

*Hemphill*, in support of the demurrer.

The plea, being in confession and avoidance of the libel charged, should have admitted that the defendant used the words in the sense and meaning alleged in the summons and plaint: *Macpherson* v. *Daniels* (*a*); and it is not sufficient to plead that the words were spoken or written in good faith and without malice: *Præger* v. *Shaw* (*b*); *Pierce* v. *Ellis* (*c*).

The occasion was not privileged. It is only where the exigencies of the case require it, as in the course of a judicial proceeding, that such communications are protected: *Revis* v. *Smith* (*d*).

The defendant's conduct amounted to a contempt of Court: *Littler* v. *Thompson* (*e*).

*Ryan* and *J. E. Walsh*, in support of the defence.

A communication will be privileged, where a person having an interest or duty (whether the latter be legal or merely social) in the subject-matter, publishes it to another person having a corresponding interest or duty, legal or social, in the matter: *Harrison* v. *Bush* (*f*); or even if the person making the communication believes

(*a*) 10 B. & C. 263.
(*b*) 4 Ir. Com. Law Rep. 660.
(*c*) 7 Ir. Com. Law Rep. 55.
(*d*) 18 C. B. 126.
(*e*) 2 Beav. 129.
(*f*) 5 Ell. & Bl. 344.

E. T. 1857.
*Common Pleas.*
RUCKLEY
*v.*
KIERNAN.

the other to whom he makes it to have such an interest or duty, although in reality he has not.—[MONAHAN, C. J. It is a common practice for attorneys to make such communications to each other; but the question is, was the defendant justified in imputing perjury?] —That would be a matter of consideration for the jury; but the question here simply is, whether or not the occasion was privileged? and that being admitted, the extent to which the communication may go is not limited: *Gilpin* v. *Fowler* (*a*). It is impossible to draw the line, where the occasion is privileged, as it clearly was in the present case: *Twogood* v. *Spyring* (*b*); *Todd* v *Hawkins* (*c*). *Wenman* v. *Ash* (*d*) may seem an authority the other way, but that case was decided upon the grounds that the defendant did not act *bona fide*.—[MONAHAN, C. J. Is there any authority as to excess in the language used?]—It is only a question for the jury: *per* Lord Campbell, C. J., in *Cooke* v. *Wilde* (*e*), referring to *Tuson* v. *Evans*. At any rate, the Court cannot go into the consideration of that question, the jury not having found whether there was excess or not, and it is altogether a question of fact. *Fairman* v. *Ives* (*f*) goes much farther than the present case, upon the question of privilege.

*Macdonogh*, in reply.

The plea does not admit that the defendant meant to impute perjury, the word "therein" only referring to the letter.—[MONAHAN, C. J. Whatever may be the meaning of that word, we do not think that the case should go into another Court upon such a question; and therefore if the case depended upon that, we would give leave to amend, imposing such terms as we should think fit.]—As to the question of privilege; it is an indictable offence to tamper with or keep back a witness: *Rex* v. *Lawley* (*g*); *Coxhead* v. *Richards* (*h*), *per* Coltman, J.; 1 *Russell on Crimes*, p. 183. The question of excess referred to by the LORD CHIEF JUSTICE has been

(*a*) 9 Exch. 615.
(*b*) 1 C., M. & R. 181.
(*c*) 2 Moo. & Rob. 20.
(*d*) 13 C. B. 837.
(*e*) 5 Ell & Bl. 341.
(*f*) 2 B. & Al. 642.
(*g*) 2 Str. 904.
(*h*) 2 C. B. 601.

distinctly recognised and acted upon in *Warren* v. *Warren* (*a*), followed by *Ahern* v. *Maguire* (*b*).

*Cur. ad. vult.*

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MONAHAN, C. J., now delivered the judgment of the Court.

This was an action brought for an alleged libel, contained in a letter written by the defendant to Mr. Vincent, to whom the plaintiff was bound as an apprentice.

It appears that in the course of some legal proceedings it became necessary that the plaintiff should make an affidavit, to be used on a motion pending in one of the Courts, and the defendant, who was attorney for the other party, thought it right to write to Mr. Vincent, who was attorney on the other side; and it is alleged that this letter was intended to induce Mr. Vincent not to make use of the affidavit on the motion. The defence is substantially a plea of privileged communication. Two objections have been raised to this plea: the first is, that the plea is informal, as not alleging that the defendant justified or excused the writing of it in the sense attributed to it in the summons and plaint; the allegation in the summons and plaint being, that the defendant by his letter imputed perjury to the plaintiff; and the plaintiff contends that the defendant should in his plea allege that he in fact believed that the plaintiff had committed perjury. The words of the defence are, "that he wrote and pub-"lished the said alleged libellous matter in the plaint mentioned, "*bona fide*, believing the several matters therein to be true, and "without malice in fact against the plaintiff, as he lawfully might." Considerable discussion has arisen as to the meaning of the words "believing the several matters therein contained to be true;" the defendant's Counsel contending that the meaning is, that he believed the imputation of perjury to be well founded. That being the sense attributed to the words used, by the summons and plaint, and which sense or meaning is admitted, by not being traversed by the defence, it is contended by the plaintiff that the defendant has merely pleaded the truth of the facts stated in the letter, without admitting that he intended to convey any particular charge. We are of opinion, in order to give effect to the present system of pleading, in which

(*a*) 1 C., M. & R. 250. (*b*) Arms. & Mac. 39.

E. T. 1857.
*Common Pleas.*
RUCKLEY
*v.*
KIERNAN.

special demurrers are abolished, and in lieu of them a party may apply to the Court to set aside any pleading calculated to embarrass, that if a party, instead of so applying to the Court, will demur, that the Court ought to give to the pleading demurred to the meaning that will support the pleading, if the words used will fairly bear such a meaning, rather than the meaning which will not support the pleading; though, perhaps, under the old system, such pleading would be objectionable for uncertainty, on special demurrer. Nor do we at all think that the opposite party can be in any way prejudiced by such a rule, as in tendering or settling issues he may insist on such construction, and it will clearly be the duty of the Judge in settling the issues to adopt such construction. We feel that we are, to some extent, introducing a new rule, but we consider it necessary for the system introduced by the recent statute; and, acting on this rule in the present case, we must hold that the defendant has, by his defence, admitted that he used these words in the sense alleged in the summons and plaint, and that he believed the imputation of perjury so made to be well founded.

This brings us to another important question—whether the occasion upon which this letter was written was privileged, so as to justify the defendant in imputing perjury to the plaintiff? Notwithstanding the research of Counsel, no case exactly in point has been cited, as to whether a party would be justified in seeking to induce the opposite attorney to suppress a document that was intended to be used upon a motion; and upon this point (which is altogether distinct from the alleged charge of perjury), we have no authority to follow; although we have been referred to several cases as to the illegality of an attempt to interfere with the due administration of justice, by inducing a witness to suppress his evidence. There can be no doubt that if a man will corruptly induce a party to forbear to give evidence, he may be guilty of a criminal offence; but we think it equally clear that if a party has made an affidavit stating matters which never occurred, and the opposite party, instead of making another affidavit to contradict such statement, honestly believing that a mistake has been made, and when the party who has made the affidavit stands in such a position as that of apprentice to the opposite attorney, if in such

a case he acts as the defendant here alleges he has done, and acts *bona fide*, we are of opinion that such an act is not criminal in its nature, and therefore that the defendant was guilty of no crime. As to whether this occasion furnishes a justification, we are of opinion that the occasion was privileged, the party writing the letter complained of having sufficient interest in the subject-matter: and the tendency of late decisions upon this subject is to extend the principle of privilege. The only remaining question is, whether a party, by going farther than the occasion justifies, by imputing not merely mistake but perjury to the plaintiff, is thereby deprived of the privilege which he would otherwise be entitled to rely upon? A case has been cited upon this subject, *Cooke* v. *Wilde*, in which Lord Campbell at the trial appears to have fallen into a mistake, having ruled that the occasion was privileged, but that the concluding portion of the letter (which contained the libel) was not privileged, as imputing an attempt to extort money by misrepresentation; and which, in his opinion, was going farther than the occasion warranted: and he accordingly directed a verdict for the plaintiff, upon the ground of excess. An application was subsequently made to set aside the verdict, and the Court (including Lord Campbell himself) came to the conclusion that the alleged excess being in relation to the same subject-matter, it was for the jury and not for the Judge to adjudicate upon it; and therefore that the learned Judge was not justified in directing a verdict for the plaintiff, but that he should have left it to the jury to say whether or not the defendant had acted maliciously, under the circumstances. This case which we are about deciding is not free from difficulty; but we are of opinion, upon the whole, for the reasons I have stated, that the demurrer should be overruled, and that the jury should be directed, if the case should come to trial, to take into consideration any language that may have been used by the defendant, over what the occasion fairly warranted, as evidence of malice, but not as of itself conclusive that the defendant had acted maliciously.

BALL and JACKSON, JJ.,* concurred.

Demurrer overruled.

* KEOGH, J., was presiding at the Consolidated Nisi Prius Court.

E. T. 1857.
*Common Pleas.*

## LITTLE *v.* THE DUBLIN & DROGHEDA RAILWAY CO.

*April* 30.

Where acts were done by a Railway Company, under the powers conferred on them by 13 & 14 *Vic.*, c. 45 (Loc. & Per.), the person injuriously affected by such acts can only obtain compensation in the manner pointed out by statute, and not by action at Law.

Compensation may be awarded by arbitration under this statute from time to time, whenever injury is done to individuals by the Railway works.

THIS was an action for diverting a water-course. The summons and plaint stated that the plaintiff was in possession of a certain parcel of land in the county of Meath, and had been, before the act complained of, in the use and enjoyment of a stream of water flowing through his land, which he used for irrigation and other purposes: that the defendants, when about to construct that portion of their Railway which runs between Navan and Kells, required a portion of the plaintiff's land for that purpose, and accordingly, in pursuance of the statutes in that behalf, entered into an agreement with the plaintiff for the purchase of a portion of his land at a certain price, after the payment of which to the plaintiff, the defendants entered into possession, and proceeded to construct their Railway; but that in so doing they cut off the stream, and wilfully, and contrary to their agreement, diverted the flow of it by the intervention of the Railway, from its ancient and accustomed channel and course through the plaintiff's land, depriving the latter thereby of the use and benefit of the water.

The defendants filed two defences. First, that the act complained of was done by them in pursuance of the provisions of the Dublin and Drogheda Railway Act (1850), and the statutes incorporated with it, submitting that if the plaintiff was injured thereby, he should have recourse to the remedies provided by these Acts, and not to an action in a Court of Law. Secondly, that they did not agree that the stream was not to be diverted, or that the plaintiff was not to be deprived of its use.

To these defences the plaintiff replied:—As to the first defence, that the mode of obtaining compensation for the value of land taken by the Company, or for injury done by the making of the Railway, was by means of an arbitrator appointed in pursuance of the Acts referred to, which also directed that the Company should prepare

maps and schedules, containing the portions of land required for the purposes of the Railway, with the names of the owners, lessees and occupiers, and estimates of the value, taking into consideration damage by way of severance, and any other matters by the Lands Clauses Consolidation Act (1845) required to be taken into consideration: that copies of such maps should be deposited at the office of the Commissioners of Public Works in Dublin, and with the Clerk of the Peace of the county; with power to the arbitrator to alter and vary any valuations that should be referred to him by the Commissioners; and that the maps, when approved of by the arbitrator, should be lodged with the clerk of the union. That notice should then be given, requiring all persons claiming any right to the lands to deliver a statement of their claims, and that the Company should then deliver to such claimants certificates stating the amount of valuation approved by the arbitrator. The replication then admitted the appointment of the arbitrator, and that the requisite steps were taken in reference to the maps and schedules; and stated that the arbitrator so appointed made his award respecting the plaintiff's interest in the lands, according as the same were laid down in the maps and schedules; averring, that the arbitrator had no power to make any award, save according to the maps and schedules; and then alleged that the maps in question exhibited the stream as running in its original channel, and did not show any diversion, so as to give the arbitrator jurisdiction to make any further award in reference to it; and that the arbitrator had made his award long before the construction of the Railway and the diversion of the stream; and also that no maps showing the diversion of the stream had been approved by the arbitrator or deposited with the clerk of the union, so as to enable him to take into consideration the grievances complained of in the summons and plaint. The plaintiff further alleged that the arbitrator, having once made his award, was *functus officio*, and could not be re-appointed in order to arbitrate again as to the same lands, or injuries affecting them from the construction of the Railway.

Demurrer, upon which the following points were noted. First, that upon the true construction of the statutes referred to, the

E. T. 1857.
*Common Pleas.*
LITTLE
*v.*
D. & D.
RAILWAY.

defendants had full authority to do the acts complained of, without the intervention of an arbitrator. Secondly, that the arbitrator, upon any dispute arising between the plaintiff and defendants, in reference to the alleged injuries, had full power to adjudicate thereon, notwithstanding that the maps and schedules did not exhibit the diversion of the stream complained of, and although no maps showing such diversion were approved by the arbitrator, or deposited with the clerk of the union. Thirdly, that there was no necessity to re-appoint the arbitrator for the exercise of any power after he had once made his award, nor ought he to be re-appointed to arbitrate a second time in reference to the said lands or the injuries thereto. Fourthly, that the arbitrator, although he may have once made his award in reference to the lands injuriously affected by the Railway, had, nevertheless, full power to determine the matters in dispute between the plaintiff and defendants, in case the same were referred to him according to the statutes.

*S. Ferguson*, in support of the demurrer.

The Dublin and Drogheda Railway Act incorporates with itself the provisions of the Lands Clauses Consolidation Act (8 *Vic.* c. 18), and the Railways Clauses Consolidation Act (8 *Vic.*, c. 20); and section 32 provides that all disputes which may arise between the Company and the owner or occupier of any adjoining lands is to be referred to and settled by an arbitrator, whose decision is to be final. Clause 3 of section 16 of 8 *Vic.*, c. 20, authorises Railway Companies to alter the course of any rivers, streams, &c., not navigable, for the purposes of constructing the Railway, and the section contains this proviso:—"Provided always, that "in the exercise of the powers by this or the Special Act granted, "the Company shall do as little damage as can be, and shall "make full satisfaction in manner herein, and in the Special Act, "and any Act incorporated therewith, provided, to all persons "interested, for all damage by them sustained by reason of the "exercise of such power." And section 6 provides that the amount of compensation is to be determined in the manner pointed out by the Lands Clauses Consolidation Act, "unless otherwise provided."

Any mode of obtaining compensation, except in the manner pointed out by these Acts, is therefore excluded. There is distinct authority on this subject: *Watkins* v. *The Great Northern Railway Co.* (*a*), *per* Erle, J. (p. 969). The plaintiff contends that the arbitrator, having made his award, is *functus officio;* but there is nothing in the statutes to show that he cannot award compensation at any time, and any other mode of obtaining it is excluded.

*Hamill* and *Battersby*, in support of the replication.

It is admited that the authority cited is law in England, but it does not apply to the present case, which comes under the provisions of a particular statute (13 & 14 *Vic.*, c. 45, Loc. & Per.), which only adopts the provisions of the Lands Clauses and Railways Clauses Consolidation Acts, so far as they are not by that Act altered and amended, and no further; and the latter Act constitutes a new tribunal for the purposes of compensation, thereby superseding the provisions of the former Act in that respect (s. 18 to s. 29).—[MONAHAN, C. J. You contend that your sole remedy was under the Special Act, but that the Company not having exhibited on their maps, as they were bound to do under that Act, the diversion of this stream, that your remedy is now by action at Law.]—Yes, and that their proceedings not having been directed in the manner provided by the statute, that they are not the subject of statutable redress.

When a Public Company do an act not according to the provisions of the Legislature, the remedy of the person thereby injured is by action at Law: *Kemp* v. *The Brighton Railway Co.* (*b*); *Broadbent* v. *The Imperial Gas Co.* (*c*), *per* Willes, J.—[MONAHAN, C. J. Did not the original plan show that the Railway must have passed between the plaintiff's lands and the head of the stream?]—It did. Compensation will be awarded to persons injured by Railway works under such circumstances: *The East India Docks Co.* v. *Gattke* (*d*); *Glover* v. *The North Staffordshire*

(*a*) 16 Q. B. 964. (*b*) 1 Rail. Cas. 495.
(*c*) 3 Jur., N. S., 221.
(*d*) 15 Jur. 261; S. C., 3 M'N. & Gor. 155.

E. T. 1857. Common Pleas. LITTLE v. D. & D. RAILWAY.

*Railway Co.* (*a*); *The London and North-Western Railway Co.* v. *Bradley* (*b*); *Ferrand* v. *The Corporation of Bradford* (*c*); *Hutton* v. *The London and South-Western Railway Co.* (*d*); *Laurence* v. *The Great Northern Railway Co.* (*e*).

*Hayes*, in reply.

It is clear from the provisions of section 32 of the Dublin and Drogheda Railway Act, that the arbitrator is not *functus officio* after having made one award, for it provides that such questions as the present one are to be referred "to the arbitrator for the time being."—[MONAHAN, C. J. That section refers to accommodation works, but the defendant does not make that case upon his plea.]—It is clear, from all the pleadings taken together, that the defendants rely upon that case; besides, a culvert or tunnel, which is an accommodation work, would have prevented the alleged injury.

MONAHAN, C. J., now delivered the judgment of the Court.

*May* 7. In this case we do not feel any difficulty in the conclusion to which we have come, notwithstanding the embarrassment caused by the several Acts of Parliament that have been discussed in the course of the argument.

An action was brought in this case against a Railway Company; and the plaintiff states that he was the owner of a farm, and had been possessed of and entitled to the use of a stream of water which flowed through his farm, and that he had employed it for the purposes of irrigation and the use of his cattle; that the defendants had purchased a part of the farm from him, and agreed with him that the stream should not be disturbed; but that, contrary to their agreement, they cut off the course of the stream, and that he has thereby sustained damage by the loss of the stream. It does not appear very clearly whether the gravamen of this case is the breach of an agreement or a mere wrongful act on the part of the Com-

(*a*) 15 Jur. 673; S. C., 20 L. J. (Q. B.) 376.
(*b*) 15 Jur. 639; S. C., 6 Rail. Cas. 551. (*c*) 21 Beav. 412.
(*d*) 7 Hare, 259; S. C., 18 L. J. (Ch.) 345. (*e*) 16 Q. B. 643.

pany, for the plaintiff says that it was contrary to their agreement that the Company obstructed the stream, and one of the defences traverses this allegation; with that defence, however, we have nothing to do at present, and we now come to the defence to which the replication which has been demurred to was pleaded; and we must view it by itself, as if no other defence had been pleaded. The defence, to which the plaintiff has replied, is this: that the defendants cut off the stream and caused it to flow in another direction, acting under the provisions of the Dublin and Drogheda Railway Act of 1850, and the statutes incorporated with it. This is their entire defence, for what follows is merely matter of law, when they state that they are protected, having acted according to the powers given them under these Acts. That allegation is not traversed by the plaintiff; in other words, he admits that they were authorised to do so under the provisions of those statutes; but his replication to this defence is, that according to the provisions of the statute of 1850 (under which it is admitted that this act of the defendants was done), it was necessary for the Company, before they should execute any works, to prepare maps and schedules showing the lands through which the intended Railway was to run, with estimates as to value, taking into consideration any damage that might result from severance caused by the Railway, and that it did not appear from the maps which had been prepared that the Company intended to divert this stream from its original course; but, on the contrary, that it appeared upon the maps that the party who enjoyed the use of the stream before the construction of the Railway should continue to enjoy it after the Railway was made, and to the same extent as previously. I conceive that what was intended to be represented by the map was this; simply, that the Railway was to run through the stream, and no doubt it does: but the person who prepared the map delineated the stream as running through the Railway, and I think that we must assume, for the purposes of this argument, that there was nothing in the map showing that the plaintiff was to be deprived of the use of this stream. That being so, the plaintiff alleges that the arbitrator had no jurisdiction to award him compensation for the loss of the

E. T. 1857.
*Common Pleas.*
LITTLE
*v.*
D. & D.
RAILWAY.

stream. Assuming that the plaintiff is right so far, we then come to another allegation that raises considerable difficulty, viz., that the arbitrator, having made his award, was *functus officio*, and had no further power to grant the plaintiff compensation. Now there is nothing to show that it was intended that the stream was to be diverted; at the same time, I cannot understand how it was to pass through the Railway, except by means of a bridge or culvert, and we must therefore assume that by some oversight no provision was made in reference to the loss of this water by the plaintiff; and we therefore must also assume that it was not contemplated that the stream was to be diverted; but still, does it follow from this that the Company had no power to divert this water? It has not been argued that they had no such power, because there is no traverse of the allegation that this act was done under the provisions of the statute, and we must therefore assume that the plaintiff admits that the Company had power to make this diversion. The Company did not intend to avail themselves of this power under the original maps; and then the plaintiff contends that if compensation for this diversion was ever to have been made, it should have been provided for under the original maps, and that not having been done, that he is entitled at Common Law to obtain damages from a jury. In that proposition I would readily concur, provided I was satisfied that there was no other mode of compensation under the statutes; and the latter question depends altogether upon the construction of these Acts of Parliament. The Act now under consideration (*a*) incorporates with itself the General Railway Act (*b*), and also the Lands Clauses Consolidation Act (*c*), and it was under the latter Acts that compensation was to be obtained in cases like the present. Where the compensation sought did not exceed £50, the claim was to be disposed of by two Justices of the Peace, and when the amount exceeded that sum, by arbitration or a jury, at the option of the party claiming compensation. Such being the original mode of obtaining compensation, this Act (the Dublin and Drogheda) was

(*a*) 13 & 14 *Vic.*, c. 45 (Loc. & Pers.) (*b*) 8 *Vic.*, c. 20.
(*c*) 8 *Vic.*, c. 18.

passed, and it contains the following recital in the 1st section.— [His Lordship read the latter part of the 1st section.]—The effect of this clause was to constitute the several recited statutes to be one Act, and that, so far as any of them may be inconsistent with this Act, to repeal them, but that, if consistent, they should be construed as one. Such being the effect of the 1st section, the next which comes under our notice is the 18th, which directs that maps and schedules should be made out by the Company, and deposited with the Commissioners of Public Works, setting forth the value of the lands, and the damage likely to be caused by the construction of the Railway; and the following sections provide for the appointment of an arbitrator by the Board of Works, to adjudicate upon these matters, and further provide that parties dissatisfied with the amount of the valuation awarded by the arbitrator may go before a Judge and jury, who are to try the matter like an ordinary traverse; and there is a further provision in section 32, that any differences or disputes as to accommodation works are to be decided by the arbitrator.

Now the argument in the present case on behalf of the plaintiff is this: that the arbitrator was at liberty, under these sections, to take into consideration all questions of damage arising from severance; and there can be no doubt that if, at the time that this Railway was originally planned, this injury had been set out on the map, and brought under the notice of the arbitrator, he would have been competent to decide upon it; but the plaintiff contends that the matter not having been thus brought before the arbitrator, there is no other mode of redress open, except by an action and the verdict of a jury. This Act (the Dublin and Drogheda) does not itself authorise the diversion of water by the Company, but it incorporates with itself other Acts which do, viz., section 16 of the Railways Clauses Consolidation Act (8 *Vic.*, c. 20), which enables Railway Companies to alter the course of streams and rivers, but concludes as follows:—"Provided always, that in the exercise of "the powers by this or the Special Act granted, the Company shall "do as little damage as can be, and shall make full satisfaction "in manner herein, and in the special Act, and any Act incorporated

E. T. 1857.
*Common Pleas.*
LITTLE
*v.*
D. & D.
RAILWAY.

"therewith, provided, to all parties interested, for all damage by "them sustained, by reason of the exercise of such powers."

It has been contended that all that the plaintiff wants is water for irrigation and for his cattle, and therefore that this is only a case for accommodation; but we are of opinion that this case cannot be made upon the pleadings: and the section I have just read shows that if a party injured does not seek accommodation, but cash for the injury he has sustained, he will be entitled to obtain it. Therefore, whatever the real facts of the case may be as regards accommodation, we are of opinion that it is not in our power to award it, and that upon the pleadings it appears that the plaintiff has sustained injury, and is entitled to compensation; but we are also of opinion that, under this Act, the time for making such works was not limited, and that if, after the execution of these works as originally laid out, or in the progress of their execution, it should become necessary to make changes or additions, the plaintiff would be entitled to compensation for any damage resulting from such additional works, but that he must seek it in the manner pointed out by the Act. The plaintiff then contends that the arbitrator, having made his award, is *functus officio*. We need not go into the consideration of this question; for this is evident, that the more clearly Counsel demonstrate that the arbitrator had no power to act in awarding compensation under the provisions of the Special Act, the more clear it is to us that (this act of the Company having been done under the authority of that statute, and in the manner pointed out by one of the general Acts), the plaintiff has the power of obtaining compensation under the more general statutes, if not under the special one; and it would be monstrous to suppose that these Acts, empowering Railway Companies as they do, to execute these works, should not afford the parties thereby injured an adequate mode of redress.

The 6th section of the Railways Clauses Consolidation Act shows that, under the general Acts, compensation may be awarded in the manner thereby pointed out. For instance, suppose the case of a man from whom no lands had been taken by the Railway, but whose property was nevertheless injuriously affected by the

works of the Company; if he cannot obtain compensation under the provision of the Special Act, it is very clear that his only remedy is under the general Acts.

We are therefore of opinion that the plaintiff should have applied for redress to the proper tribunal, and that he has mistaken his remedy by bringing his case before a jury in an action at Common Law. The demurrer must therefore be allowed.

BALL and JACKSON, JJ., concurred.*

Demurrer allowed.

* KROGH, J., was absent at the Consolidated Nisi Prius Court.

## ASHFORD *v.* TUITE.

*May* 2, 4, 7.

A composition deed was executed by an insolvent, for payment of his creditors, which, after reciting that it was intended to be for the benefit of all the creditors named therein, assigned the property of the insolvent to a trustee, in trust to pay rateably and proportionably "the parties hereto who shall execute these presents within one calendar month from the date hereof." *Held*, that this, being an assignment in trust for the benefit of *all* the creditors of the insolvent, came within the definition of "an assignment for the benefit of the creditors," in the interpretation clause of 17 and 18 *Vic.*, c. 55, and therefore did not require registration.

TROVER.—This action was brought to recover the value of certain goods, which had been seized by the defendant under the following circumstances:—A person named Robert Roy had become indebted to his mother Mrs. Jane Roy in the sum of £260, and to the defendant in the sum of £7. 2s. 6d., and his mother had issued execution against him in April 1856. Roy subsequently became insolvent, and at a meeting of his creditors (at which the defendant did not attend) it was arranged that a composition of ten shillings in the pound should be accepted by them, and a circular to that effect was sent to all the creditors. A composition deed was subsequently prepared, bearing date the 10th of May 1856, which purported to be made between Robert Roy of the first part, W. Ashford (the plaintiff, as trustee for himself and the other creditors of R. Roy)

E. T. 1857.
*Common Pleas.*
ASHFORD
*v.*
TUITE.

of the second part, and such of the creditors as should execute the deed, of the third part; and reciting that Roy was indebted to the several persons in the schedule thereto annexed, in the sums therein described, and was unable to pay in full, and had proposed to assign his estate and effects to the trustee named therein, for the benefit of the creditors named therein, conveyed the entire property of Roy to the plaintiff, in trust to collect and sell the effects, and out of the proceeds, after payment of expenses, to pay and satisfy rateably and proportionably, and without any preference or priority, "the parties hereto of the third part, who shall execute these presents within one calendar month from the date hereof," the sums set opposite to their respective names in the schedule.

This deed was executed by all the creditors of Roy, except the defendant and two others, and the defendant subsequently issued an execution and seized the goods of Roy. It was proved that the defendant had received notice of the execution of the composition deed, and also that Roy had continued in possession of the property up to the time of the execution of the deed; and after the plaintiff got possession under the deed, Mrs. Roy (the mother of the insolvent) carried on the business as usual, for the plaintiff, and that Robert Roy continued to act as a shopman.

This case was tried before the Lord Chief Justice of the Court of Common Pleas, at the Sittings after last Hilary Term; and the only question of law raised at the time was, whether the deed of the 10th of May 1856 should have been registered under the provisions of the 17 & 18 *Vic.*, c. 55? and his Lordship left this question to the jury, whether or not the proceedings were colourable, and whether or not Roy continued in possession and ownership notwithstanding the deed? The jury found a verdict for the plaintiff for £25; but his Lordship directed a verdict for the defendant, upon the grounds that the deed should have been registered, with leave reserved to the plaintiff to have a verdict entered for him for the amount found by the jury, if the Court above should be of opinion that registration of the deed was not requisite. A conditional order for that purpose having been obtained—

*W. Bourke* showed cause.

The 17 & 18 *Vic.*, c. 55, after reciting that frauds have been frequently committed upon creditors by secret bills of sale, whereby persons are enabled to keep up the appearance of being in good circumstances, and the grantees of such bills of sale are enabled to take possession of such property, to the exclusion of the rest of the creditors, enacts that every bill of sale made after 31st July 1854, whether absolute or conditional, or subject to any trust or otherwise, under which the grantee shall be enabled to take possession of the property, shall be filed with the Master of the Court of Queen's Bench, within twenty-one days after its execution; otherwise such bill of sale to be null and void, as against assignees of bankrupt or insolvent, or persons seizing under execution, as regards the property comprised in such bill of sale, which, at the time of such bankruptcy, insolvency or execution, and after the expiration of twenty-one days as above mentioned, shall be in the possession or apparent possession of the person making such bill of sale, or any other person against whom the process shall have issued, under or in execution of which such bill of sale shall have been made. The interpretation clause declares "bill of sale" to mean assignments, &c., for possession of personal chattels as security for any debt, but provides that it shall not include assignments for the benefit of the creditors of the person making or giving the same." The Act also interprets the words "apparent possession."

This cannot be considered a deed "for the benefit of the creditors of the person making the same," as it only professes to be for the benefit of such creditors as should sign it within a certain time, and was not in fact signed by all the creditors.

*Lynch* and *W. Sidney*, contra.

This case does not come within the statute. The Act only applies to cases in which possession did not pass under the bill; whereas in the present case the bill was executed to a trustee, who has continued in possession throughout, and therefore the property cannot be said to be "in the possession or apparent possession" of the person making such bill of sale. The taking

E. T. 1857.
*Common Pleas.*
ASHFORD
*v.*
TUITE.

of possession by the trustee gives the bill of sale the same validity that registration would have done.

The deed must also be considered as made for the benefit of all the creditors, although every one of them did not sign it; for it was intended for the benefit of all creditors; and in a Court of Equity they might all obtain payment under it: *Raworth* v. *Parker* (*a*); *Nicholson* v. *Tutin* (*b*).

*Harkan*, in reply, cited *Simmonds* v. *Pallas* (*c*).

*Cur. ad. vult.*

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MONAHAN, C. J., now delivered the judgment of the Court.

*May* 7.

This action was brought against the defendant for seizing certain goods and chattels, alleged to be the property of the plaintiff, who claimed to be entitled to them under a deed, by which a person named Roy had assigned to the plaintiff, in trust, a considerable amount of property, including the subject-matter of the present action. The defendant appears to have been a creditor of Roy's for a small debt, for which he had obtained a civil-bill decree, under which he seized the property in question, believing that it belonged to Roy. The question at the trial was, whether this property belonged to Ashford, claiming under the deed of assignment, or whether it was the property of Roy? in which case the defendant would have being justified in seizing it under the civil-bill decree. The deed was produced at the trial, and the chief question was whether this was a *bonâ fide* deed of assignment, executed under such circumstances as to pass the property to the plaintiff, and to bind the creditors of Roy? The jury found that it was a *bonâ fide* deed, and barred the property as against the creditors. An objection was then made, to this effect, that under the provisions of 17 & 18 *Vic.*, c. 55, the deed of assignment should have been registered in the Court of Queen's Bench within twenty-one days after its execution, as amounting to a bill of sale within the meaning of that statute; and that not having been so registered,

(*a*) 2 K. & J. 163. (*b*) 2 K. & J. 18.
(*c*) 8 Ir. Eq. Rep. 346.

the defendant was at liberty to treat it as null and void, whatever may have been its effect as against those who were parties to it; and the only answer made to that objection was that, upon the true construction of the Act, this document did not require registration, for that it came within the exception in section 7, viz., "assignments for the benefit of the creditors of the persons making the same;" and it was contended that this was an assignment for the benefit of *all* the creditors of Roy, and therefore was valid without registration. At the trial, I was of opinion that it was not an assignment for the benefit of all the creditors of Roy, under the provisions of the Act, and therefore that registration was necessary. There was, no doubt, a recital in the deed that it was "for all the creditors;" but the operative part of it only provided "for "such creditors as should assent to the deed, by the execution by them thereof;" and therefore, although perhaps a Court of Equity might allow a creditor, not a party, to come in under it afterwards, upon the legal construction of the instrument, I considered that it was only a deed for the benefit of those who should sign it within the month.

Under these circumstances, I directed a verdict for the defendant, but took a note of the objection, and I also took the opinion of the jury as to the value of the property, in order that a verdict might be entered for that amount, if the Court should be of opinion that the plaintiff was entitled to a verdict. Upon the argument of the case, another objection has been raised, viz., that where possession goes with the deed (the deed being *bonâ fide)* at the time of its execution, under such circumstances the property not being in the possession, or apparent possession, of the debtor, the provisions of the Act do not apply. We do not intend to decide this question; for we are of opinion that it is not open to the plaintiff to raise this point, it not having been made at the trial; for if it had been put to me at that time, I would have taken the opinion of the jury as to whether the property was in the possession, or apparent possession, of the debtor or his assignee; but the real question in the case is, whether, since this deed appears to be only for the benefit of such of the creditors of Roy as should execute it

E. T. 1857.
*Common Pleas.*
ASHFORD
*v.*
TUITE.

within a certain time, and there being some who have not executed it, it is to be construed "an assignment for the benefit of the creditors" of Roy, under the terms of the 7th section. It appears that no names were attached in a schedule to this deed; but it was intended that all who should sign the deed within a certain time should have the benefit of annexing the several debts due to them severally, and it was not signed by any of the creditors when the trustee executed it.

It is argued that this is not of necessity a deed for the benefit of *all* the creditors, because, in point of fact, some did not execute it; but the question remains, whether, inasmuch as it was intended to be for the benefit of such as should execute it within a given time, in a manner agreed to at a particular meeting, and upon notice to the creditors, it was an assignment for the benefit of all the creditors? The assignment in the Act of Parliament is material.—[His Lordship read it.]—And the object of it was to prevent private bills of sale when the possession did not go with them; but, as I have before stated, we have nothing to do with the latter question. The only question we have to consider is, whether this is a deed assigning the property for the benefit of the creditors? Supposing that the trust had expressly been made for the benefit of all the creditors, and that the money was to have been paid to them all rateably in discharge of their several demands, and that the deed stated this to be the duty of the trustee, and that the creditors should all come in within a limited time to have their debts paid, still any creditor might refuse to take the benefit of such a provision, and might say, "I will not take the benefit of this deed of assignment, I prefer to take the chance of being paid hereafter."

Therefore, we are of opinion that, under the terms of the Act, the fact of some of the creditors not having elected to come in under this deed does not prevent this instrument from being an assignment for the benefit of all the creditors of Roy. But, it may be asked, does not the provision that this deed was to be executed within a certain number of days show that it was not to have been for the benefit of all the creditors? We are of opinion that it does not, and that this instrument may have been

E. T. 1857.
*Common Pleas.*
ASHFORD
*v.*
TUITE.

prepared and executed in such a way as that all the creditors might have taken advantage of it if they chose to do so; that it came within the exception in the 7th section; and therefore that the verdict should be changed into a verdict for the plaintiff. On the other hand, as I was of opinion at the trial that the defendant was entitled to a verdict, but that the matter was worthy of re-consideration, we shall not give costs. The rule, therefore, shall be, a verdict for the plaintiff for £25, each party to abide their own costs of this motion.

BALL and JACKSON, JJ., concurred.*

Rule accordingly.

* KEOGH, J., was absent at the Consolidated Nisi Prius Sittings.

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## BLOUNT *v.* EVANS.

T. T. 1857.
*May* 30,
*June* 3.

Where, to an action for receiver's fees, the defendant having replied a judgment recovered in his favour in a former suit for the same demand, the plaintiff rejoined that the judgment was one on a demurrer which did not go to the merits of the cause. The defendant having neglected to rejoin or demur to this replication, the Court allowed the plaintiff to enter a rule, requiring the defendant, in the alternative, to rejoin or demur in four days, or judgment. *Semble.*—The 102d section of the Common Law Procedure Act does not authorise the settlement of an issue which can be tried only by the Court.

LAWSON (with whom was *Rogers*) applied to the Court for liberty to mark judgment. The action was brought to recover receiver's fees. The defendant pleaded a judgment of the Court of Queen's Bench in his favour in a former action. The plaintiff replied, setting out, *in hæc verba*, the judgment of the Queen's Bench, and averring that the judgment so pronounced was one upon a demurrer for a point of form, and did not conclude the merits. This replication has neither been rejoined nor demurred to; and inasmuch as it tenders an issue in fact, which can only be tried by an inspection of the record, the plaintiff will be precluded from going further, unless the Court interpose.

T. T. 1857.
*Common Pleas.*
BLOUNT
*v.*
EVANS.

*M'Mahon*, contra.

The replication admits the judgment stated in the plea. The plaintiff cannot force the defendant to rejoin or demur; for the 42nd section of the Common Law Procedure Act says that "no rule to plead shall be necessary." The issue cannot be determined by the Court, because there is no rejoinder of *nul tiel record.* If the plaintiff marks judgment, it must be at his peril.

MONAHAN, C. J.

This case must stand over until next Wednesday. In the meantime we will see what course should be adopted. There are no provisions in the Common Law Procedure Act for the case of the plaintiff replying a record. If this replication came within the Act, a Judge must settle issues on it, and if so, he might have to settle an issue of law for the Court, and one of fact for the jury. But if the case be not provided for, then the plaintiff may be entitled to enter a rule calling for a rejoinder to the replication. If such be the true construction of the Act, and we give you leave to enter such a rule, upon the defendant's failing to rejoin, you will be entitled to mark judgment. We have no doubt that if Mr. *M'Mahon's* client wishes to have the question at issue properly argued, which we do not want to prejudge, he may, by demurring to the replication, and saying that it is no answer to his plea, raise the real question at issue on the record, for the determination of this Court. We, however, have no power to force the defendant to demur, so as to put the matter on the record; but we have, I apprehend, only power to allow you to enter a rule to make the defendant rejoin. We should, however, before doing so, wish to see what may be the construction of Mr. Whiteside's Act on the present question, as we think that, in some shape or other, it should be placed on the record.

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*June* 3.

*Rogers* now renewed the above application.

*M'Mahon*, contra.

MONAHAN, C. J.

We will in this case allow you to enter a rule requiring the defendant to rejoin or demur, within four days after service; and in default of his so doing, the plaintiff to be at liberty to mark judgment.

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## MARSH *v.* WILLIAMS.

*June* 6.

M., the holder for value of a bill of exchange, sued W., the accommodation acceptor, who pleaded infancy. Notice of trial was served in 1855, for the ensuing Summer Assizes, but was afterwards withdrawn, and no further proceedings were taken for more than two years. W., in order to be in a position to apply for a rule, under 16 & 17 *Vic.*, c. 113, s. 106, that the defendant should recover the costs of the action, in default of the plaintiff proceeding to trial, obtained a conditional order, pursuant to General Rule 178, for liberty to proceed. The defendant showed cause, upon the ground that the drawer of the bill had, at the time of the indorsement, represented to him that the defendant was of full age.—*Held*, that the defendant was entitled to an absolute order, under Rule 178, in order that he might, at all events, exercise his Common Law right of taking down the record for trial by proviso.

HEMPHILL, on behalf of the defendant, moved to make absolute a conditional order for liberty to proceed, pursuant to the 178th General Rule. This was an action on a bill of exchange for £100, brought in May 1855, by the indorsee against the defendant, who was an accommodation acceptor. The defendant pleaded infancy, and thereupon the plaintiff served notice of trial for the Kildare Summer Assizes 1855. On the 27th of July, previous to the Assizes, notice of trial was withdrawn, and no step had since been taken by the plaintiff. The object of the present application was to put defendant in a position to enter a rule under the Common Law Procedure Act 1853, s. 106, for the purpose of obtaining the costs of the action, in default of the plaintiff proceeding to trial within the time limited. Before doing so, it was necessary to get liberty, under the 178th Rule, to proceed, inasmuch as more than a year and a day has elapsed. The plaintiff had filed an affidavit as cause, from which it appeared that the defendant never got any value for the bill, and though £100 was claimed in the plaint, the affidavit of the plaintiff admitted that only £59 was

T. T. 1857.
*Common Pleas.*
MARSH
*v.*
WILLIAMS.

due when the action was commenced. He also admits that the defendant was, at that time, an infant.

*Todd*, contra.

It is stated in the plaintiff's affidavit that Burke, the drawer of the bill, had represented the defendant to be of full age when the plaintiff discounted the bill, and the defendant had since admitted his liability. This brings the case within the authority of *Newton* v. *Farrall* (*a*).

*Hemphill* replied.

MONAHAN, C. J.

This application must be refused, with costs. The authority referred to has no application to the present case. There the defendant had, himself, represented to the plaintiff, when he accepted the bill, that the defendant was of full age. It was an application to enter up judgment as in case of a nonsuit, which is always an application to the discretion of the Court. But here it is not suggested that the defendant represented himself to the plaintiff to be of full age, which was done by a third party; and, moreover, we have no right to prevent an order being made absolute, without which the defendant could not exercise his Common Law right of having a trial by proviso.

Motion granted, with costs.

(*a*) 2 L., M. & P. 139.

T. T. 1857.
*Common Pleas.*

## BROWN *v.* CHADWICK.

*May* 28,
*June* 11.

A lease for lives contained the following exception:— "Excepting and reserving unto the said (lessor) all mines, minerals and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises, and carry away the same."— *Held*, not to include open limestone quarries which the lessee had been in the habit of working.

*Semble.*— Ejectment was not the proper remedy of the lessor in this case, but either to remove the limestone himself, or bring trover for it when removed by the lessee.

This was an action of ejectment, and was tried before Richards, B., at the Clonmel Spring Assizes for 1857.

The summons and plaint alleged that the plaintiff was, on the 17th of January 1857, entitled to the peaceable possession of all that and those the several limestone and other quarries, situate on the lands of Clonbrick and Cotifiagh, in the barony of Clanwilliam and county of Tipperary, which were demised by a lease, made on the 22nd of August 1822, between the Right Hon. Lady Caroline Damer and William Chadwick the defendant; and averred that the latter wrongfully withheld the possession thereof from the plaintiff.

The indenture of lease purported to have been made on the 22nd of August 1822, between the Right Hon. Caroline Damer, of Milton Abbey, in the county of Dorset, of the one part, and William Chadwick, of the other part, whereby Lady Caroline Damer, for the considerations, &c., thereinafter mentioned, demised to William Chadwick, his heirs and assigns, the townlands of Clonbrick and Cotifiagh, containing 251 acres, and situate in the barony of Clanwilliam and county of Tipperary, together with the rights, members and appurtenances thereunto belonging; "excepting and always "reserving unto the said Lady Caroline Damer, her heirs and "assigns, all mines, minerals and other royalties whatsoever, "and all timber or other trees now planted or hereafter to be "planted on the said demised premises, with liberty to search for, "dig, raise, manufacture on the premises, cut down, and carry "away the same, and also to hunt, hawk, fish and fowl on the "said premises:" to have and to hold to the said William Chadwick, his heirs and assigns, for the lives of the *cestui qui vies* therein mentioned, and the survivors and survivor of them, subject to the yearly rent and the performance of the covenants therein contained. The

T. T. 1857.
*Common Pleas.*
BROWN
*v.*
CHADWICK.

plaintiff, having proved the above lease, also gave in evidence a conveyance of the lessee's interest in the premises by the Commissioners of the Incumbered Estates Court to himself, in the year 1853. He also proved that rent had been paid by the defendant to the plaintiff under the lease, and that there were upon the premises limestone quarries, the possession of which had been demanded by the plaintiff and refused by the defendant; and also a notice, bearing date the 1st of May 1856, directed to the defendant, by the plaintiff's agent, and cautioning the former against further working the quarries in question.

The defendant proved, by several witnesses, that the quarries were open and had been worked before the year 1822; and his Counsel contended that, even supposing that these quarries were reserved by the lease, the plaintiff was bound by the Statute of Limitations; but that, upon the true construction of the lease, the exception only applied to unopened quarries, for which ejectment would not lie. At the close of the case, the learned Judge required defendant's Counsel to state what questions he required to be put to the jury, and the following questions were agreed upon by Counsel at both sides:—First, whether the quarries on the defendant's lands, or any and which of them, were at the date of the lease of 1822 open quarries? Secondly, whether the defendants, or any and which of them, have been in the exclusive and uninterrupted enjoyment and use of the quarries, or any and which of them, from the time of the making of the lease up to the time of the serving of the notice of May 1856? The jury found that the quarries were open quarries, and that the defendants were in the uninterrupted possession of them. His Lordship then directed a verdict for the defendant, but reserved leave to the plaintiff to apply to the Court above to have the verdict changed into a verdict for the plaintiff, if the Court above should be of that opinion.

A conditional order having been obtained for that purpose, *Lynch* showed cause.

The chief question in this case is whether these limestone quarries come within the description of "mines and minerals?" and the true

distinction being that a quarry is open at the surface, and a mine is an excavation under ground, they cannot be considered to be mines, nor their produce minerals, which are substances raised from mines: *Davill* v. *Roper* (*a*); *Co. Litt.* 54 *b*; 1 *Furl. Land. & Ten.* p. 658. The next point which arises is this—whether a landlord, under such an exception in a lease, can maintain ejectment before the termination of the lease, and thus exclude the tenant from the use of open quarries, supposing the former to have a right to the enjoyment of the thing reserved, or even to proceed by injunction? But if these quarries can be the subject of an ejectment, they may also be the subject of adverse possession; and it was proved that the tenant has had the use of them since 1822; therefore, if they did not pass under the demise, they are the tenant's absolute property, for a right to mines may be established by twenty years' adverse possession: *Curtis* v. *Daniel* (*b*).

*Sir C. O'Loghlen* and *Richard Armstrong*, contra.

The term "minerals" includes all quarries of this kind, and more especially limestone: 2 *Saund.* p. 259 B; *Earl of Ross* v. *Wainman* (*c*); *Micklethwait* v. *Winter* (*d*). The word "royalties" will also include limestone: *Purcell* v. *Nash* (*e*).—[KEOGH, J. That was the case of an injunction for raising and selling the limestone, and may be distinguished from the present case.]—As to *Davill* v. *Roper*, it was upon the construction of a particular instrument, and comes within the rule *noscitur a sociis*. It is admitted that the Statute of Limitations applies to mines, but there must be a continual uninterrupted possession in the person claiming the right, and a total absence of possession on the part of the landlord: *Smith* v. *Lloyd* (*f*), citing the decision of Blackburne, C. J., in *M'Donnell* v. *M'Kinty* (*g*). They also cited *Seaman* v. *Vawdrey* (*h*); *Norway* v. *Rowe* (*i*); *Lord Courtown* v. *Ward* (*k*), *per* Lord Redesdale; *Boyd* v. *M'Curdie* (*l*).

(*a*) 3 Drew. 294.
(*b*) 10 E. 273.
(*c*) 14 M. & W. 859; S. C. in Error, 2 Exch. 500.
(*d*) 6 Exch. 644.
(*e*) 2 Jones, 116.
(*f*) 9 Exch. 572.
(*g*) 10 Ir. Law Rep. 514.
(*h*) 16 Ves. 392.
(*i*) 19 Ves. 156.
(*k*) 1 Sch. & Lef. 8.
(*l*) Sm. & Batt. 425.

T. T. 1857.
*Common Pleas.*
BROWN
*v.*
CHADWICK.

*Hemphill*, in reply.

Such exceptions in a lease must be construed *fortius contra proferentem: O'Donnell* v. *Ryan* (*a*); *Earl of Cardigan* v. *Armitage* (*b*); *Bullen* v. *Denning* (*c*). It is the mode of working that determines what is a mine and what is a quarry; and it has been held that limestone may be a mineral, viz., taken from a mine, if excavated under ground: *Rex* v. *The Inhabitants of Sedgley* (*d*); and it has been also held that an underground clay-pit is under the same circumstances a mine: *Rex* v. *Brettell* (*e*); but limestone if raised from the surface is not a mine; *Rex* v. *The Churchwardens of Alderbury* (*f*). *Purcell* v. *Nash* was not so decided, on the ground that the word "royalties" includes limestone, which is not the case: *Townley* v. *Gibson* (*g*). He also cited *Plowd.*, p. 233; *Earl of Falmouth* v. *Alderberry* (*h*).

*Cur. ad. vult.*

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MONAHAN, C. J.

*June* 11.

This case, which is an action of ejectment on the title, was tried before Richards, B., at the last Assizes for the county of Tipperary. The ejectment was brought by the plaintiff for the recovery of certain limestone and other quarries, situate in the lands of Clonbrick and Cotifiagh, in the barony of Clanwilliam, and county of Tipperary. The plaintiff, at the trial, gave in evidence a lease of the 22nd of August 1822, by which the Right Hon. Caroline Damer demised the lands of Clonbrick and Cotifiagh to Mr. William Chadwick, for a term of years still subsisting, and in the lease were contained certain reservations. He also proved a conveyance to him of the interest of the Honorable Caroline Damer in those lands by the Incumbered Estates Court, made in the year 1853, by which he became entitled to the interest in those lands, subject to the lease of 1822, which was correctly set forth in the schedule to the conveyance. It was proved at the time that there were a number of open limestone quarries

(*a*) 4 Ir. Law Rep. 62.
(*b*) 2 B. & Cr. 197.
(*c*) 5 B. & Cr. 842.
(*d*) 2 B. & Ad. 65.
(*e*) 3 B. & Ad. 424.
(*f*) 1 E. 534.
(*g*) 2 T. R. 701.
(*h*) 1 M. & W. 211.

on the lands, and that the defendant had been in the habit of using them before the bringing of the ejectment, and that a notice had been served by the plaintiff on the defendant, cautioning him against working these quarries. This was the plaintiff's case.

The defendant's case consisted of evidence, which proved satisfactory to the jury, that these quarries, for which the ejectment was brought, had been open quarries at the time the lease of 1822 was executed; and the question submitted to the jury, and found by them in the affirmative, was, whether these quarries were open quarries at the time the ejectment was brought? Another question was also submitted to them, namely, whether the defendant had been in the uninterrupted enjoyment of the quarries in question since the year 1822, so as to enable the defendant to rely upon the Statute of Limitations? We do not think it necessary, from the view we take of the case, to consider this latter question, for upon other grounds we are of opinion that the plaintiff has failed to establish his case in this ejectment. The question before the Court is this, whether these open quarries were at the time of the making of this lease reserved to the landlord? The exception was as follows:—"Reserving unto the said Lady Caroline Damer, "her heirs and assigns, all mines, minerals and other royalties what-"soever, and all timber or other trees, now planted or hereafter to "be planted on the said demised premises, with liberty to search "for, dig, raise, manufacture on the premises, cut down and carry "away the same, and also to hunt, hawk, fish and fowl on the said "premises." Now the tenant alleges that under the granting part of this lease, if it stood alone without the exception, these quarries, assuming that they were open quarries at the time of making the lease, would have passed to him under the lease; and there can be no question but that they would have passed to him as part of the land; nor do we entertain any doubt but that, as far as the use of the material upon the premises went, he was entitled to them; but if the exception has the effect which the landlord seeks to give it, it will, no doubt, derogate from what the tenant would otherwise be entitled to under the grant; for they would be vested in the landlord, and the tenant could not interfere with them, as he might

T. T. 1857.
*Common Pleas.*
BROWN
*v.*
CHADWICK.

have done under the granting part of the lease. There can be no doubt as to the old rule of law, that where anything passes under a grant, an exception which would derogate from that grant must be clear and explicit; in other words, the grantor cannot defeat his own grant by a dubious exception. This proposition is stated in *Bullen* v. *Denning* (*a*). Such being the rule of construction, the question for the Court here is, whether the exception is sufficiently clear, to deprive the tenant of the use of these limestone quarries, and to vest them in the landlord?

Counsel, during the argument, referred to the different terms of the exception; and we first come to consider these words, "all mines, minerals and other royalties whatsoever," and whether open limestone quarries come within any of these denominations? No authority has been cited to support such a proposition, but, on the contrary, a class of cases have been referred to, commencing from *Plowden*, to show that whether a thing be a mine or not depends to a very great extent upon the mode of working it. It is so laid down in *Darvill* v. *Roper* (*b*), and the judgment of the Vice-Chancellor in that case clearly shows, that these limestone quarries do not come within the meaning of the word "mines." If, then, they be not mines, are they minerals, within the terms of the exception?

The chief authorities referred to upon this subject are *The Earl of Ross v. Wainman* (*c*), affirmed in Error (*d*); *Micklethwaite* v. *Winter* (*e*). In the former case it was ruled that the word "minerals" did include limestone quarries; but let us consider the facts of that case. It was not a decision upon the construction of a grant, or a deed *inter partes*, but upon a private Act of Parliament for the inclosure of common, which, after reciting the title of the lord of the manor, proceeded to allot the land to the commoners, reserving to the lord all mines and minerals of what nature or kind soever, in as beneficial a manner as he might have enjoyed the same if the Act had not been passed; and what the Court decided was this, that having regard to the former rights of the lord of the manor, in that

(*a*) 5 B. & C. 852.
(*b*) Drew. 284.
(*c*) 14 M. & W. 859.
(*d*) 2 Exch. 800.
(*e*) 6 Exch. 645.

particular case, the word "minerals" should be taken to include such limestone quarries, but not as a general rule. The case of *Micklethwaite* v. *Winter* was also a decision upon the construction of an Inclosure Act, and was decided upon the authority of the preceding case, and on the same grounds. Then we come to consider *Darvill* v. *Roper* (*a*). In that case an agreement had been entered into between the parties for a partition, and in the deeds executed for that purpose "the mines of lead and ore, or other mines and minerals," were excepted; and the question arose as in the present case, whether limestone quarries came within the exception? Several witnesses were examined, and they all coincided in opinion as to the word "minerals," the scientific meaning of which they explained to be, any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. If that were the true definition of the word, it would without doubt include not only limestone, but every other stone or earth that might be discovered under the surface of the ground. Several other witnesses, including engineers and solicitors, were also examined in that case, as to the local custom of the country, regarding the meaning of the word "minerals;" a large body of whom deposed that the word was understood to mean limestone, and an equally large portion deposed to the contrary: so that the Vice-Chancellor had to consider what the true construction of the term was, without much regard to the evidence. He refers to the cases of *Ross* v. *Wainman* and *Micklethwaite* v. *Winter*, and approves of those decisions, but points out that they went on the particular intention of the Legislature, and the nature of the transaction in each case; but he decided that, in the case before him, all that was reserved consisted of what lay under the surface of the ground, and did not include limestone quarries, where the material was raised by opening the surface: and I, for one, cannot see any good reason, but quite the contrary, for holding, that where a lease of land is made in a limestone district, reserving mines and minerals to the landlord, that every stone above and below the surface should come within such a reservation: nor can

(*a*) 3 Drew. 294.

T. T. 1857.
*Common Pleas.*
BROWN
*v.*
CHADWICK.

I understand how any one but a lawyer could suppose for a moment that, under an exception of mines, minerals and other royalties, every particle of limestone upon the premises, whether above or below the surface, including small stones and gravel, might be taken away by the landlord.

But another point of view puts this case beyond all question: for even supposing that the word "minerals" includes limestone, how could the landlord bring ejectment for these quarries? The manner in which the question was raised in England was by an action of trover for the stones, after they had been severed from the lands; and it appears to me that the proper mode in which the landlord should have asserted his right in this case would have been either by removing the stones himself, or waiting until the tenant did so, and then bringing trover.

The distinction between a mine and a quarry appears to me to be this—a mine is a place where the substratum is excavated, but the surface is unbroken; whereas in a quarry the surface is opened, and the material, in the present case limestone, is exposed and raised. In the present case, if the landlord could maintain ejectment, he would be entitled to take possession, not merely of the rocks and stones, but of the land itself, if he succeeded in the action.

Upon these grounds, we must allow the cause shown.

Cause allowed.

T. T. 1857.
*Common Pleas.*

## ATKINSON *v.* CONGREVE.

*June* 6, 11.

The plaintiff being about to contract marriage with E. D., a letter was written by the defendant, who was a first cousin and intimate friend of E. D., to a sister-in-law of E. D., in which the defendant stated that she had been informed by a person, who was first cousin both of the defendant and also of E. D., of certain facts injurious to the character of the plaintiff, and requesting that the person to whom the letter was addressed should communicate these facts to a brother of E. D., or to E. D. herself, and that she might make what use she thought fit of the letter, in order that inquiries might be made relative to the character of the plaintiff.—*Held*, to be a privileged communication.

*Held also*, that the fact of the letter having been written to a third person, and not to E. D. herself, and the direction to the former to make what use she thought fit of it, did not divest the privilege, but might be matter for the jury from which to infer *mala fides*.

LIBEL.—The summons and plaint alleged that the plaintiff, who was a widower, had been about to contract marriage with one Emma Durbin, and that the defendant falsely and maliciously wrote a letter in reference to the plaintiff's marriage, addressed to one Mrs. George Durbin, in the words following:—"One subject, however, I must mention, for I feel bound to do so, in the hope that you have still the influence I believe you once had with Emma. 'I have been more grieved than I can say, since I left Lough, to 'hear from Mrs. Longfield the most unfavourable report of Dr. 'Atkinson" (the plaintiff); "I do think more inquiry ought to be "made about him, and you are at liberty to show this to Frederick" (brother of Emma Durbin), "indeed I hope you will, or send it to "Emma herself; for if she was foolish enough to make it a reason "for quarrelling with me, I don't mind if it should lead her to pause "before she takes the step she is about to do. Mrs. Longfield "entirely advises my telling you, and using her name, but will not "give up the authority from whom she had it. This friend lives "in the neighbourhood of Drogheda, and has long known all about "Dr. A. for many years. Mrs. Longfield inquired what sort of man "he is; 'Why, if you inquire Dr. Atkinson's character, I can only "'say it is a very bad one. He sticks at no foul means to get "'money. He treated his first wife extremely ill, and for some bad "'reason or other prosecuted her father, and it is well known that "'money is his object in everything.' This same person had heard "of his intended marriage, and also that he has asked several persons "in Drogheda to give him a good character, if any one should in-"quire; he is not a gentleman, and it is clear he has not the feelings

T. T. 1857.
*Common Pleas.*
ATKINSON
*v.*
CONGREVE.

"of one. Either his father or he was bailiff to a large brewery, in "that neighbourhood, and for years they have been known to the "person from whom Mrs. Longfield heard of him. Now no one "can doubt why he marries Emma; and surely some means should "be taken to open her eyes, for the person from whom all this came "had no object in saying it, but merely replied to Mrs. Longfield's "inquiries. Do let me know if you can do anything. Mrs. Longfield "wishes it to be written to Frederick, but I thought that as I was "writing to you it would be as well, and you might be able to say a "word to Emma. You may make any use you like of my letter."

The defendant filed a plea of privileged communication; it was to the following effect:—That the defendant was a near relation of Miss Emma Durbin, her mother and the defendant's mother having been sisters; and that the defendant always lived upon terms of close intimacy and friendship as well with Miss Durbin as with the rest of her family, and felt great friendship as well for Miss Durbin as for the rest of her family, and a desire for her welfare. That both the father and mother of Miss Durbin were dead; that her eldest brother was Frederick Durbin, alluded to in the alleged libel; that he was a clergyman, and resided near Cambridge, and that Mrs. George Durbin, to whom the letter was written, was the wife of another brother of the young lady, and resided in the neighbourhood of Frederick Durbin, with whom she had constant opportunities of communication: and that Miss Durbin resided in the same neighbourhood, with an unmarried sister. That some time before the writing of the letter in question, the plaintiff had proposed marriage to Miss Durbin, and that the defendant, both on account of her intimacy and friendship for Miss Durbin, had an interest in the intended marriage; that the defendant had been on a visit at the house of Mr. Longfield, in the county of Cork, whose wife, Mrs. Longfield, was first cousin of Miss Durbin, and also of the defendant; and that Mrs. Longfield had informed the defendant that, having made inquiries relative to the character of the plaintiff, she (Mrs. Longfield) had received information upon that subject, which she communicated to the defendant, which substantially were the matters mentioned in the letter, the alleged libel; that Mrs. Long-

field also expressed a wish that Frederick Durbin should be informed of these matters, and advised the defendant to write to Mrs. George Durbin on the subject, authorising her to use her (Mrs. Longfield's) name, but refusing to give up the authority from which she had received the communications. The defendant further alleged that she wrote the letter in question, without malice, and honestly, by way of advice, and believing the same and every part of it to be true, and in the belief that it was her duty under the circumstances to do so; and that she wrote the letter in question under such circumstances, and in discharge of a duty which she owed to Miss Durbin and to her family. To this plea the plaintiff demurred, on the grounds that it did not disclose a good defence, inasmuch as no such duty was to be collected from the facts stated in the plea, and because the letter in question was not written in reply to any communications made by Miss Durbin relative to the character of the plaintiff, but voluntarily to a third party; and also because the defence did not deny that the defendant authorised the person to whom it was written to make any use she thought fit of its contents; and that the defendant had neither such an interest in, or duty relative to the subject matter of the libel, as to authorise her to write the letter in question.

*Shegog*, in support of the demurrer, cited *Toogood* v. *Spyring* (*a*); *Harrison* v. *Bush* (*b*); *Coxhead* v. *Richards* (*c*); *Somerville* v. *Hawkins* (*d*); *Præger* v. *Shaw* (*e*); *Todd* v. *Hawkins* (*f*); *Gilpin* v. *Fowler* (*g*).

*Mills* and *Lawson*, in support of the plea, cited *Child* v. *Affleck* (*h*); *Fairman* v. *Ives* (*i*); *Rex* v. *Bailey*, cited in *Bac. Abr.*, *Libel*, A.

*Lynch* was heard in reply.

*Cur. ad. vult.*

(*a*) 1 Cr., M. & R. 181. (*b*) 5 Ell. & Bl. 344.
(*c*) 2 C. B. 569. (*d*) 10 C. B. 583.
(*e*) 4 Ir. Com. Law Rep. 660.
(*f*) 2 Moo. & Rob. 20.; S. C. 8 Car. & Pay. 88.
(*g*) 9 Exch. 615. (*h*) 9 B. & C. 403.
(*i*) 5 B. & Ald. 642.

T. T. 1857.
*Common Pleas.*
ATKINSON
*v.*
CONGREVE.
*June* 11.

MONAHAN, C. J., now delivered the judgment of the Court.

This case comes before the Court upon a demurrer to the defendant's plea. The plaintiff, who resides in Drogheda, states that, at the time of the committing of the grievance complained of, he was a widower, and about to contract marriage with one Emma Durbin, and that the defendant published a letter addressed to Mrs. George Durbin, to the following effect.—[His Lordship read the letter.]—I need not go at large into this letter, the only material part being that referring to the plaintiff's character, and stating that he had ill-treated his former wife, and prosecuted his father-in-law. It also refers to money dealings in which the plaintiff was concerned, and concludes by expressing a wish that Miss Emma Durbin could be induced to make inquiries relative to the plaintiff's character.

The publication of this letter, by sending it to Mrs. G. Durbin, being the only publication complained of, the defendant pleads substantially as follows:—That she is, and was at the time of the writing of the letter complained of, a cousin-german of Emma Durbin, and always lived on terms of the greatest intimacy with her; that the father and mother of Emma are both dead; that Frederick was the eldest brother of Emma, and that Mrs. George Durbin, to whom the letter was written, was the wife of George Durbin, who is another brother of Emma, and a surgeon in the navy; that Frederick lived near Cambridge, where Emma also resided; and that the defendant had been informed by a Mrs. Longfield, another cousin of Emma, of matters which were substantially what she communicated in the letter; and that the statements which she so made were made honestly and *bona fide*, for the purpose of preventing the marriage, or at any rate of causing inquiries to be made relative to the plaintiff, but without any malicious motive. There was a good deal of argument relative to that passage in the letter, requesting that it should be shown to Frederick and Emma, and stating that Mrs. George Durbin might make any use she liked of it. To this defence the plaintiff has demurred; and the argument was mainly upon this question, whether or not the occasion makes this letter a privileged commu-

nication?—that is to say, whether this lady, being a cousin-german and friend of Emma Durbin, but without any application being made to her by Emma for information on this subject, was in such a position as to be authorised in interfering as she has done? This was the chief question relied upon; and we do not feel any hesitation in saying, that a person in the position of cousin and friend to a young lady about to be married may interfere for the purpose of preventing what he or she may conceive to be an imprudent or improper match; and we are of opinion that the well-being of society requires that such a privilege should exist. The case chiefly relied upon by the defendant was *Todd* v. *Hawkins* (*a*), in which the defendant, who was the son-in-law, wrote a letter to his mother-in-law relative to her intended marriage; and the person whom she was about to marry brought an action for imputations against him contained in the letter; but the Court held that, however disagreeable the letter might be to him, if it was written *bona fide*, it was a privileged communication, although a voluntary act on the part of the defendant; and that the warmth or strength of the expressions used did not deprive the defendant of his right to rely upon the privilege. Such expressions might be evidence of *mala fides*, to go to the jury.

In the present case, we do not entertain the least doubt that the defendant, being the intimate friend and cousin-german of Miss Emma Durbin, did stand in such a position, whether a moral duty existed or not, that she had a liberty to interfere to prevent what she *bona fide* believed to be an imprudent marriage.

The other question relied upon by the plaintiff was this; whether, as the communication was not made to the lady herself directly, but to another lady, married to her brother, who was authorised by the writer to make what use she thought fit of the letter, it did not come within the class of privileged communications?

We are of opinion that these circumstances did not divest the privilege; but that, on the contrary, if the letter was written *bona fide* to Mrs. George Durbin, to be communicated by her to the brother of the young lady, or to any other person standing *in loco*

(*a*) 2 Moo. & Rob. 20.

T. T. 1857.
*Common Pleas.*
ATKINSON
*v.*
CONGREVE.

*parentis* towards her, and calculated to influence her conduct; it was written upon a privileged occasion; but that at the same time, such matters are evidence to go to the jury, whether the letter was written *bona fide*, or with a malicious motive. The demurrer must, therefore, be overruled.

BALL and KEOGH, JJ., concurred.

JACKSON, J.

Not having been present at the argument of the case, I cannot take part in the judgment.

Demurrer overruled.

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M. T. 1857.
*Nov.* 3.

## CAROLAN *v.* NOLAN.

A plaintiff, having marked judgment upon an award, became insolvent; but no suggestion of his insolvency was entered upon the record of the judgment. The defendant having been subsequently arrested, under a *ca. sa.* upon the judgment, the Court set aside the proceedings, but restrained the defendant from bringing an action.

IN this case an action had been brought by the plaintiff against the defendant, upon a money transaction, which resulted in a reference to arbitration, and an award was made, by which the plaintiff was to receive £27 and costs. The damages were paid, but the costs, which amounted to £76, remained unpaid, and it was agreed that they should be paid by instalments. Subsequently to the plaintiff's marking judgment upon the award, he became an insolvent, and was discharged, and an assignee appointed. The defendant offered terms to the assignee's attorney, which were refused, and the defendant was arrested under a *ca. sa.* No suggestion of the insolvency of the plaintiff had been entered on the record of the judgment, and the present motion was to discharge the defendant out of custody, on account of the irregularity in the proceedings.

*Macdonogh*, in support of the application.

Under the old practice it was necessary, in case of the insolvency or bankruptcy of the party who had obtained final judgment, that

his assignees should proceed by *scire facias:* 2 *Wm. Saund.*, p. 72, *note K; Winter* v. *Kretchman* (*a*); *Colebeck* v. *Peck* (*b*). Even in case of interlocutory judgment, such was the practice: *Waugh* v. *Austin* (*c*).

The present practice is laid down in section 149 of the Common Law Procedure Act (1853), which enacts that "in case it shall be-"come necessary to revive a judgment, by reason of lapse of time, "or of a change, by death *or otherwise*, of the parties entitled, or "liable to execution, the party alleging himself to be entitled to "execution may apply to the Court or a Judge, on an affidavit "ascertaining the amount due, for leave to enter a suggestion upon "the record, of the judgment, to the effect that it manifestly appears "to the Court that such party is entitled to have execution;" and the suggestion, when filed, concludes the parties, and is not traversable: *Makesy* v. *Alcock* (*d*); *Lewis* v. *Forsyth* (*e*).—[MONAHAN, C. J. The only question is, whether it would have been necessary to proceed by *scire facias*, under the old practice, in this case?]

*E. M. Kelly*, contra.

It may be the safer course to enter a suggestion, but it is not necessary in cases of interlocutory judgment, and there is no distinction between interlocutory and final judgment for such purposes: *Arch. Pr.*, p. 1068 (9th ed.), citing *Waugh* v. *Austin*.

He also cited *Guinness* v. *Carroll* (*f*).

*Sidney*, in reply, referred to *Foster on Sci. Fa.*, pp. 99, 167, 365; *Yeo & Bill.*, p. 369; *Chitty's Forms*, p. 480; *Kelly on Sci. Fa.*, p. 77.

MONAHAN, C. J.

The legal right to issue execution upon the judgment in this case has been transferred by the insolvency of the plaintiff to his

(*a*) 2 T. R. 45.
(*b*) 2 Ld. Ray. 1280.
(*c*) 3 T. R. 437.
(*d*) 6 Ir. Jur. 110.
(*e*) 5 Exch. 904.
(*f*) 1 B. & Ad. 459.

M. T. 1857.
*Common Pleas.*
CAROLAN
v.
NOLAN.

assignee, and that right cannot exist in two persons at the same time. It cannot be questioned that, under the old practice, if a writ of *scire facias* had been sued out in the name of the assignee, the latter could have issued execution on the judgment. The general rule is, that if, after final judgment, anything occurs which has the effect of transferring the right to the judgment to a third person, a writ of *scire facias* must issue; but the Common Law Procedure Act has substituted for the writ of *scire facias* another mode of proceeding in cases like the present; and therefore a suggestion should have been entered in this case. The defendant, however, must be restrained from bringing an action. His regular course was by *auditâ querelâ.*

*Macdonogh* applied for the costs of the motion, on account of the defendant being restrained from suit. The Court granted the costs of the motion.

Rule accordingly.

## MARIA M'LOUGHLIN and others *v.* J. H. CRAIG.

*(Queen's Bench.)*

*June* 3.

To a summons and plaint for rent, due under a lease, the defendant pleaded, as to a moiety of the sum claimed, that one A B was in possession of a portion of the premises, and that plaintiffs and the lessee instituted proceedings in ejectment against A B, and that A B recovered judgment in said proceedings before any portion of said sum demanded became due, and still remained in possession; and that defendant never occupied said portion of the premises. *Held*, that this defence amounted in substance to a plea of eviction by title paramount.

[*Dubitante*, CRAMPTON, J.]

THE summons and plaint claimed a sum of £150 for one and a-half year's rent due out of certain premises demised by the plaintiffs and others deceased, to one William Boyd, on the 15th of July 1833, for a term of three lives still subsisting, and renewable for ever; which premises, it was alleged in the plaint, had vested in the defendant by assignment, and that since said assignment the said sum of £150 had accrued due.

To this the defendant pleaded as to £75, part of said sum of £150, that before and at the time of making the said indenture of 15th July 1833, one Matilda M'Loughlin was by herself and her undertenants, and still is, in possession of a portion of said premises in plaint mentioned; and that being so in possession, the plaintiffs and William Boyd in his lifetime instituted proceedings in ejectment against the said Matilda M'Loughlin, for recovery of said portion, and that Matilda M'Loughlin had recovered judgment in said ejectment against the plaintiffs and William Boyd, and before any portion of said sum of £75 became due, and has since retained and continued in possession of the said portion of the premises; and that, by reason thereof, the said William Boyd in his lifetime, and the defendant since his death, and from thence and before the time of the accruing of said sum of £75, were kept out of the possession and enjoyment of said portion of the premises, and neither he nor the said William Boyd had, since making said indenture, or since said judgment in ejectment, any use, possession or enjoyment of the said portion. To this defence the plaintiff demurred.

*Mackay* (with him *T. O'Hagan*), in support of the demurrer.

This defence is bad, as it does not allege that Matilda M'Loughlin had, during the period of the accruer of rent claimed, any title

T. T. 1856.
*Queen's Bench*
M'LOUGHLIN
*v.*
CRAIG.

to the possession of the portion of the premises stated to have been occupied by her. Consistently with this defence, she might have claimed to hold the possession as tenant for a term, the reversion of which passed to Boyd, and the defendant as his assignee. The lessor is entitled to recover the entire of this rent; there can be no apportionment, the entire of the premises having passed under the lease: *Neale* v. *Mackenzie* (*a*). This is not the case of an eviction, and therefore the rent is not apportionable. The defendant, having taken possession under the lease, cannot now be heard to say that a portion of the premises was in possession of a third party: *Holgate* v. *Kay* (*b*).

*Concannon* and *D. Lynch*, contra.

*Neale* v. *Mackenzie* is not applicable, because though the lessor could not bring an action for an apportioned part of the entire rent reserved, yet there was nothing to prevent him bringing use and occupation for the portion of the premises actually occupied by the lessee: *Tomlinson* v. *Day* (*c*). The plea here amounts in substance to an eviction by title paramount, and that is an answer to the action for the rent: *Doe* d. *Vaughan* v. *Meyler* (*d*). There, where there was a lease of lands of which the lessor was seised in fee, and of other lands of which he was seised for life, with a power of leasing, at one entire rent, and the lease not well executed according to the power, it was held that the lease was good after the death of the lessor for the lands in fee, though not for the other lands, for the rent may be apportioned.

LEFROY, C. J.

In this case we are of opinion that this demurrer must be overruled. It is plain that, upon an eviction by title paramount, the lessee may either give up the lease or hold the part of which he remains in possession, at an apportioned rent. That is well settled. Then the question in this case is, are the matters stated on the defence, by which the defendant says he was disabled from getting possession of a portion of the lands, equivalent to an eviction

(*a*) 1 M. & W. 747.
(*b*) 1 C. & K. 341.
(*c*) 5 Moore, 558.
(*d*) 2 Maule & S. 276.

by title paramount? that is, has enough been shown to satisfy the Court that the lessee was prevented, by title paramount in Matilda M'Loughlin, from getting possession of the entire of the land demised by the lease? The defence alleges that Matilda M'Loughlin was in possession of part of the premises previous to the lease being made; and that she continued in possession up to and after the making of the lease; and that subsequently an ejectment was brought by the lessor and lessee in that lease, and that they failed to disturb her possession. It must be assumed that she showed title against both parties, against the lessor antecedent to the lease, and against lessor and lessee after the lease; and that ever since, during the accrual of the rent, she continued in possession. The question then is, whether that is a substantial averment of matters whence the law deduces what may be called a *presumptio juris*, that, *de jure*, she was in possession by title paramount? When the landlord made the lease, he must have known in what condition the property stood at the time he let it; it was his duty not to make a lease to a stranger, save of what he had to demise; a stranger could not know that Matilda M'Loughlin was in possession by title paramount. He had no muniments of title; had nothing to do with the land before the lease was made to him. The lease imports that the title went with the possession; there is no recital in it of any outstanding lease, or that there was any in reversion. It was incumbent on the landlord, therefore, when he seeks to enforce the entire rent, to show his right, to establish that Matilda M'Loughlin was in possession as a sub-lessee, or in some way under him; whereas it is averred, in the defence, that the lessee never had any benefit or enjoyment under the lease of the portion of the premises in question. If anything were shown to establish that a rent had been received for this portion from Matilda M'Loughlin, by the defendant getting the reversion to which that rent was incident, that would not be inconsistent with the right of the landlord to recover the entire rent; but that averment ought to have come from the plaintiff. This defence amounts in substance to an eviction by title paramount; and as in such case the lessee is entitled to hold the remaining portion of the premises, paying a proportionate part of the entire rent, or to abandon all, so here

T. T. 1856.
*Queen's Bench*
M'LOUGHLIN
*v.*
CRAIG.

the defendant is entitled to a similar election. This demurrer, therefore, must be overruled.

CRAMPTON, J.

I do not dissent from the judgment pronounced by my LORD CHIEF JUSTICE, although I feel some difficulty on the points suggested. It has never been decided that the position of a lessee, taking a lease at an entire rent from a landlord, who had power to demise a portion only of the thing demised, not having power to demise the residue, is equivalent to an eviction by title paramount. I do not think that has yet been decided, although the case cited, of *Doe* v. *Meyler*, comes near it. A party there made an underlease of premises, over part of which he had a power, and over another portion of which he had no power; it was held in that case that there must be an apportionment, and that the tenant must pay the apportioned rent for the portion the landlord had power to demise. There is another question on which I also have some difficulty; that is, as to the meaning of that portion of the plea which alleges a possession in Matilda M'Loughlin, and nothing more. It is consistent with that plea that Matilda M'Loughlin may have been in a temporary possession, or she may have been a tenant of the lessor; and if that were so, the whole rent is payable to the landlord, and there is no apportionment. It is said, however, that there are statements in the plea contradictory of the presumption that Matilda M'Loughlin was in as tenant to the lessor. I feel some difficulty on these two points; but if the landlord allege she had only a temporary interest, the Court will not prevent his now replying that matter, upon payment of the costs of the demurrer.

PERRIN and MOORE, JJ., concurred with the CHIEF JUSTICE.

Demurrer overruled.

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NOTE.—1 *Wms. Saund.*, p. 204 *a*; where it is said that the position is doubtful, that in order to excuse a lessee from payment of rent, upon an eviction by a stranger, he must show that the stranger had good title to evict him. *Simons* v. *Farren* (1 Bing. N. C. p. 272, cited in 2 *Wms. Saund.*, 181 *a*) seems to establish that it is sufficient in a plea to allege generally that the defendant was evicted by one having title to the premises.

E. T. 1856.
*Queen's Bench*

## THOMAS RICHARDSON
*v.*
## THOMAS CORCORAN, nominal defendant, and sued as Clerk of the Commissioners for the Town of Carlow, under the Towns Improvement Ireland Act (1854.)

*May* 3, 5, 6.

An action, against the Commissioners of a town, constituted under the Towns Improvement Act, sued by their clerk, in their *quasi* corporate capacity, will not lie for damages for an improper dismissal from that office.

If any liability for such dismissal attach, it can only be actionable against the Commissioners personally. Where a bill of exceptions is taken, a motion in arrest of judgment cannot be made, and if an order have been granted on such motion, it can only be upheld by abandoning the exceptions, otherwise there might be two writs of error on the same record. Money having been lodged in Court on one count of a summons and plaint, and drawn out by the plaintiff, that count is to be afterwards considered as struck out, and should be wholly excluded from consideration on a motion in arrest of judgment as to the other counts.

This was an action brought by the plaintiff, for arrears of salary due to him, as clerk to the Town Commissioners of Carlow, and for a wrongful dismissal from his office as such clerk. The first paragraph of the summons and plaint alleged that the Commissioners for the town of Carlow, under the Towns Improvement Ireland Act 1854, were indebted to the plaintiff in the sum of £22, for the salary of the plaintiff, due and payable to him from the said Town Commissioners, for his services as clerk, by him before done and performed, for and upon the employment and retainer of the Commissioners of said town (appointed by virtue of the Act 9 *G.* 4, c. 82), for a long time previous to and until the first election of Commissioners, under the Towns Improvement Act 1854, which election took place on the 20th of January 1855; and also for his services as clerk, by him done and performed, upon the employment and retainer of the said last-mentioned Commissioners since said election.

The second paragraph averred that, on the 14th of December 1853, the plaintiff was duly employed and appointed by the Commissioners, under 9 *G.* 4, *c.* 82, as their clerk, and in the execution of said Act, at a salary of £30 per annum; and, being so employed, he continued to act as such clerk in the execution of said Act, at said salary, and to discharge the duties of said office with

E. T. 1856.
*Queen's Bench*
RICHARDSON
*v.*
CORCORAN.

diligence and fidelity, until the 1st of January 1854, and from thenceforth until the first election of Commissioners, under the Towns Improvement Ireland Act (1854), which took place on the 20th of January 1855; whereupon and by reason of the premises, and by force of the last-mentioned Act, the plaintiff became and was employed as the clerk of the said last-mentioned Commissioners, at said salary. *Breach.*—That although the plaintiff did always, from thenceforth until the time of his dismissal, diligently discharge the duties of such clerk, and was ready and willing and offered to be employed and to continue to act as such clerk, or in any office of an analogous nature, under the provisions of the said Towns Improvement Act 1854, and to discharge the duties thereof faithfully, yet the said last-mentioned Town Commissioners, not regarding their duty, removed and dismissed the plaintiff from said office.

The third paragraph was similar to the second, with this addition to the breach, that the defendant dismissed and removed him without appointing him to any office of an analogous nature, and kept him so removed; whereby the plaintiff lost great gains which he would have made out of said office, and was also deprived of great gains he would have realised by reason of his acting as such clerk or as Town-clerk, in and about carrying into effect, in and for the borough of Carlow, the provisions of 13 & 14 *Vic.*, c. 69 (Registry Voters Act); to the plaintiff's damage of £1000.

To this summons and plaint, as to the first paragraph, the defendant pleaded payment into Court of the sum claimed, viz., £22.

To the second cause of action, defendant pleaded that the plaintiff, after the election of the said Commissioners, and after he became and was employed as their clerk, did not always from thenceforth, until the time of his dismissal as clerk of the Commissioners, diligently discharge the duties of such clerk, and was not always ready to be employed as such clerk, or to do the duty of such clerk; and that the Commissioners did not, on the 22nd of July 1855, remove the plaintiff from his office of clerk; but, on the contrary, the plaintiff was removed for the cause thereinafter mentioned; that is to say,

that at or immediately before an adjourned meeting of the Commissioners, duly held on the 27th of January 1855, the plaintiff, being then clerk of the Commissioners, served a notice on the chairman of the Commissioners, insisting that he was their clerk, and claiming to be entitled as such clerk; but notwithstanding such notice and claim, the plaintiff did not attend said meeting, but absented himself from the meeting, and withheld from the Commissioners at the meeting the minutes of their proceedings at their last meeting, taken and entered by him as their clerk, and the books, papers, &c., of the former Commissioners of the town of Carlow, lately existing and elected under 9 *G.* 4, c. 82, which of right belonged to the said Commissioners, under the Towns Improvement Act, Ireland, 1854, and then were in the custody of the plaintiff as such clerk: whereupon the chairman of the Commissioners wrote a notice to the plaintiff, requesting his immediate attendance at the meeting, and requiring him to bring with him all papers, books and documents in connection with and belonging to the Commissioners elected under 9 *G.* 4, then in his possession, so as to enable the Commisssioners under the Towns Improvement Act to proceed with the business for which they were elected; and the said notice was forthwith duly delivered to the plaintiff, and came to his hands in sufficient time to have complied therewith during the said meeting of the Commissioners, and long before they proceeded to remove the plaintiff, as hereinafter stated. It further averred that one of the Commissioners personally required the plaintiff to attend the meeting of the Commissioners, which the plaintiff refused to do, and that the Commissioners having waited a reasonable time after delivery of the notice, the chairman, by direction of the Commissioners, wrote a letter, which was delivered to the plaintiff, requiring his attendance within a reasonable time, with the papers, books, &c., in his possession belonging to the Commissioners, with which letter the plaintiff did not comply; and the non-compliance of the plaintiff having been notified to the Commissioners, and the plaintiff having absented himself from the meeting, and withheld the papers, books, &c., and persisted in withholding the same, and in so

E. T. 1856.
*Queen's Bench*
RICHARDSON
*v.*
CORCORAN.

absenting himself, notwithstanding said notice; and the Commissioners, being by such conduct delayed and impeded in the transaction of their business, passed a resolution to the effect that, although the plaintiff insisted he was their clerk, yet he was unwilling to do his duty as such clerk, and appeared to be determined to frustrate the Commissioners in carrying said Towns Improvement Act into execution, by absenting himself, and declining to attend as requested by said notice, and by withholding said books and papers; therefore the Commissioners were of opinion the plaintiff had forfeited any right which he might have had to be their clerk: and accordingly, the Commissioners dismissed his said pretensions, on account of his wilful neglect of duty and disobedience of orders; and so the plaintiff was dismissed and removed from said office of clerk by the Commissioners, as they lawfully might for the causes aforesaid; and afterwards, the Commissioners proceeded to elect, and did elect, in the room of the plaintiff, the defendant as their clerk.

To the third cause of action the defendant pleaded that no notice in writing was delivered to him and to the said Commissioners, or left at his or their office or usual place of abode, stating the said third cause of action, one month before the writ of summons and plaint was sued out or served, pursuant to the statute in such case made and provided.

On the pleas to the second and third causes of action, issues were taken, traversing in substance the allegations contained therein. On these issues the case was twice tried. On the first trial, before Pigot, C. B., at the Spring Assizes, for the county of Carlow, a verdict was found for the plaintiff on all the issues. This verdict was set aside, without costs; and the case was again tried before Monahan, C. J., at the following Summer Assizes, and a verdict was again had for the plaintiff. At this trial, exceptions were taken to the charge of the learned Judge, which exceptions were afterwards set down for argument. A conditional order was obtained in the following Term, to arrest the judgment, on the ground that the action as stated on the record was not maintainable, and that there was no precedent or foundation in law to sustain the second and third causes of action.

*Macdonogh* (with him *Hayes*), for the plaintiff, showed cause against the order.

The defendant's Counsel, having taken exceptions at the trial, and having also obtained a conditional order to arrest the judgment, ought now to be compelled to elect on which they will proceed. The questions at issue between the parties may be raised on the exceptions; whereas, if the judgment be now arrested, it would be then open to the defendant to proceed with the exceptions, and two writs of error might then arise on the same record.

*Battersby* (with him *H. Smythe*), for the defendant, proposed to let the bill of exceptions stand, until the motion in arrest of judgment was disposed of. They cited *Ward* v. *Freeman* (*a*).

LEFROY, C. J.

It was formerly held that there could not be a writ of error upon a *venire de novo;* however, now the law is otherwise.* If therefore the exceptions be overruled, and the Court are of opinion, on the motion in arrest of judgment, that there is no ground to maintain the action, on the second and third counts, there might then be two writs of error in the same cause. The defendant must therefore elect whether to proceed with his exceptions, or uphold the conditional order.

The defendant's Counsel having, on this intimation, abandoned their exceptions—

*Macdonogh* and *Hayes* were then proceeding to show cause against the conditional order, arguing on the first paragraph and the defence thereto, when—

*Battersby* objected that no issue had been joined on this defence, and that this portion of the pleadings therefore was out of the case. The 78th section of the Common Law Procedure Act (1853) pro-

(*a*) 1 Ir. Com. Law Rep. 677.

* *Vide* 19 & 20 *Vic.*, c. 102, s. 49.

E. T. 1856.
*Queen's Bench*
RICHARDSON
*v.*
CORCORAN.

vides for ascertaining the sufficiency of the payment of money into Court, by an issue raised for that purpose. Where money is lodged in Court and accepted, the pleading in reference thereto should be considered as struck out of the plaint, and judgment marked for the plaintiff: *Hughes* v. *Guinness* (*a*).

LEFROY, C. J.

The judgment can only be arrested on the second and third paragraphs; the argument, therefore, must be confined to these.

*Macdonogh.*

It will be argued that the plaintiff cannot maintain this action against the clerk of these Commissioners, inasmuch as if he recovered judgment he would have no means of enforcing it; but that objection is set at rest by the case of *Kendall and others* v. *King, Clerk to the Committee of the Cambridge Lunatic Asylum* (*b*). That was an action brought against the defendant, as clerk of a committee, under the provisions of 8 & 9 *Vic.*, c. 126. By the 17th section of that Act, a select number of the Justices for a county or borough, called "the committee of visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c.; and by section 16, they were enabled to sue and be sued in the name of their clerk; and it was held, that an action might be maintained against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them, although the plaintiff might have no means of enforcing his judgment when obtained.

The summons and plaint is quite correct. An averment of malice is not essential: true, an action cannot be maintained against a judicial officer unless there be malice; but it is otherwise if the act done be a ministerial act, for then malice is not essential, and need not be averred; but even if malice were necessary as a foundation for the action, malice in law appears on the record.

(*a*) 4 I. C. Law Rep. 314; S. C., 7 Ir. Jur. 298.
(*b*) 17 C. B. 483.

The Commissioners here are not a corporation, but they are entitled to sue and be sued by their clerk. The case of *Harman* v. *Tappenden* (*a*) may be cited, but that does not apply to the present case; for there, the clerk of a corporation was sued, and it was held that the action was not maintainable, because malice was not proved. So also, in the case of *Edwards* v. *Lowndes, Clerk of the Board of Health for Burslem* (*b*). There, by 6 *G.* 4, c. 181, Commissioners were appointed trustees to carry out the purposes of the Act; and by the 91st section it was directed that, after paying the expenses of obtaining the Act, the remainder of the money in the hands of the trustees should be applied, at the discretion of the trustees, in payment of various things; amongst others, in paying the salary to the organist of B. church, and in reducing and paying off the several sums of money borrowed on mortgage, by virtue of the Act. In an action on the case by the organist, against the Commissioners, for a breach of duty in not paying his salary, it was held that the Commissioners and the organist stood in the relation of trustee and *cestui que trust*, and that, in the absence of a specific appropriation of a part of the fund to the plaintiff, no action lay, the remedy being in Equity. There they were mere trustees, and a Court of Equity was the proper place to settle disputes between them. *Davis* v. *Black* (*c*) and *Ferguson* v. *Kinnoul* (*d*) show what is essential in an action like the present; that if the law cast a duty upon a person who refuses or fails to perform it, he is answerable in damages to those whom his refusal or failure injures; and if persons having judicial functions are also required to do ministerial acts, they may be sued for damages occasioned by their neglect or refusal.

The breach of duty is here alleged in the very words of the Act of Parliament; and where Commissioners are performing a public duty, or one arising from contract, they are liable to an action; and it is no answer to say that the injured person may apply for a mandamus to compel them to do their duty; the statute enjoins a duty, and a violation of that duty, causing a personal

(*a*) 1 East, 555.
(*b*) El. & B. 81.
(*c*) 1 Q. B. 900.
(*d*) 9 Cl. & F. 251.

E. T. 1856.
*Queen's Bench.*
RICHARDSON
v.
CORCORAN.

damage, is actionable. Where any statute requires an act to be done for the benefit of another, or to forbear the doing an act which may be to his injury, though no action be given in express terms by that statute, for the omission or commission, the general rule of law, in all such cases, is, that the party injured shall have an action: *Ashby* v. *White* (*a*); *Bogg* v. *Pearse* (*b*). That was an action against Commissioners, under a local Act, for salary of officers, whom the Act authorised them to appoint, at a salary to be paid out of the rates to be raised thereunder; and it was held that the proper remedy was either by action on the case or a mandamus. In that case, Jervis, C. J., says:—"It does not however follow that "the only remedy is by mandamus. In *Cane* v. *Chapman* (*c*), case "was held to be maintainable against a clerk to Commissioners, "there being a public duty which they had neglected to perform." The only question here is, was what is complained of done under or by virtue of the Act under which the Commissioners act? The plaintiff here sues for malfeasance as well as nonfeasance, for a breach of positive duty.

*Battersby* and *Smythe*, contra.

The summons and plaint avers the dismissal of the plaintiff. Now the Commissioners had no power to discharge him, they being but trustees for levying a rate; and to that extent alone their power goes, and that power is confined to a levy not exceeding one shilling in the pound. For acts done contrary to their duty, they are responsible, but not *qua* Commissioners. If the law contended for by the other side be correct, the Commissioners might dismiss all the old officers, and appoint others in their place, and thus defeat the object of the Act, by imposing an extra rate not contemplated by the statute under which they act. If they so acted, the action would be against the wrong-doer personally, not against the Commissioners in their official capacity, otherwise the effect would be to impose on the rate-payers an illegal charge: *Duncan* v. *Findlater* (*d*). It was there held, that trustees appointed under a Public Road Act

(*a*) 14 St. Trials, 785.
(*b*) 10 C. B. 534.
(*c*) 5 Ad. & El. 647.
(*d*) 6 Cl. & F. 894.

were not responsible for any injury occasioned by the negligence of the men employed in making or repairing the road; the funds raised by such Act not being chargeable with compensation for such an injury. The subsequent appointment of a clerk in the place of the plaintiff would be no answer to a mandamus; the appointment being illegal, the office is vacant: *Rex* v. *Barker* (*a*); *The King* v. *The Bishop of Chester* (*b*). Further, no action lies against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to another, at least not without proof of malice: *Harman* v. *Tappenden* (*c*). Malice must be averred and proved: *Saxon* v. *Castle* (*d*); and in such case the action would lie, not, however, in their *quasi* corporate capacity. *Ferguson* v. *Kinnoul* (*e*) shows that they are liable only in their individual capacity. If a writ of mandamus were obtained, an attachment would lie against the members of the Corporation for disobedience to its mandate: *The Queen* v. *Ledgard* (*f*). In *Edwards* v. *Lowndes* (*g*), the case of *Cane* v. *Chapman* was cited, and the Court say they will not follow it. *Pardoe* v. *Price* (*h*). The Commissioners are trustees of a specific sum, and the Court would enforce against them the due performance of the trust. If this action be allowed against the clerk, there are no means of reimbursing him. Mandamus would give a full and effectual remedy; and if any loss have been incurred by the plaintiff, an action lies against the individuals who have caused it. Besides, it was incumbent on the plaintiff suing to show that sufficient rates were levied to meet the demand: *Andrews* v. *Dally* (*i*).

*Macdonogh* replied, and cited, on the point of the mandamus, *Regina* v. *Mayor of Chester* (*k*).

*Cur. ad. vult.*

(*a*) 3 Burr. 1265.
(*b*) 1 T. R. 396.
(*c*) 1 East, 555.
(*d*) 6 A. & E. 652.
(*e*) 9 Cl. & Fin. 251.
(*f*) 1 Q. B. 616.
(*g*) 1 El. & B. 81.
(*h*) 13 M. & W. 267.
(*i*) 4 Bing. 566.
(*k*) 2 Jur., N. S., 114.

E. T. 1856.
*Queen's Bench*
RICHARDSON
*v*
CORCORAN.
*May* 6.

LEFROY, C.J.

We are of opinion that the judgment in this case must be arrested; and, having arrived at that conclusion upon a very clear ground, it is not necessary to advert in detail to all the cases that have been cited in the argument, with a view to establish that an action is maintainable against those Commissioners personally. On that point we give no opinion; though, conceding there has been a violation of the Act under which they are appointed, I think there cannot be much doubt that for that violation the Commissioners are personally liable. But the objection here is, that the Commissioners are sued officially, by their clerk, and not personally; and it is contended that, by the Act of Parliament, their clerk can only represent the Commissioners in matters done in pursuance of the Act; that they are clothed with official authority to carry the Act into execution, and they are to sue and be sued through their clerk for such matters; whereas the present action is brought for a breach of the Act of Parliament. This is an action for unliquidated damages, and it is plain upon the record that the only judgment which can be given, and execution thereon, would be against the clerk. Follow out the judgment, and see the result. By the 94th section of the Towns Improvement (Ireland) Act 1854, the clerk in whose name any action is brought or defended is to be fully reimbursed, out of the general assessments to be levied under the Act, all the costs, damages and expenses to which he shall or may be or become liable to pay. Did the Legislature mean to place the clerk in a position in which he could not be recouped? Certainly not. The Commissioners are by section 60 to levy a rate, not in any year "to exceed the rate of one "shilling and sixpence in the pound, where the enactments of this "Act, with respect to water, have been adopted, or the rate of one "shilling in the pound where such enactments, with respect to "water, have not been adopted," for the purposes of the Act; and they have no right to make a levy for any other purpose, or beyond these respective amounts. Now, the Legislature did not intend that the clerk of the Commissioners should be liable in his own person for a personal wrong of the Commissioners, and, through the intervention of a judgment and execution, to place him in the position of

bringing an action against the Commissioners, to recoup himself for the injury sustained by their personal act. We cannot imagine the Legislature contemplated such a circuity of action. The clerk represents the Commissioners, for the purpose of carrying out the Act, but not for a violation of the Act. This is a Special Act of Parliament, for special purposes, "to make better provision for the "paving, lighting, draining, cleansing, supplying with water, and "regulation of towns in Ireland," appointing Commissioners to carry out its provisions, and enabling them to impose a rate for the purposes of the Act, and these only. By the interpretation clause (section 1), the expression "the Commissioners" shall mean a majority of the Commissioners, for the purposes of this Act, acting in and for a town by which this Act has been in whole or in part adopted; and, by section 60, "the Commissioners shall assess all occupiers of "premises within the town, and the boundaries thereof, &c., in the "sums necessary to be levied for the purposes of this Act." It is, however, under the 94th section that it has been argued the defendant is liable in his representative capacity for the act of these Commissioners; and what are its provisions? "The Commissioners may "sue and be sued in the name of the clerk for the time being, for or "concerning any contract, matter or thing, relating to any property, "works or things vested in them, by reason of the provisions of this "Act, or relating to any matter or thing whatsoever, entered into "or done by them under the provisions of this Act," &c. Is a wrong done by the Commissioners a thing vested in them? Can it be said that a violation of the Act is a thing done by the Commissioners in pursuance of the Act, and that for that violation redress is to be had by medium of a provision for carrying the Act into execution—that damages are to be had against them, not personally, but in their official capacity, for a violation of the Act? It is quite impossible to maintain that position—that the thing done in violation of the Act is to be treated as done under its provisions, or that the Commissioners are to be liable *quâ* Commissioners for acts so done. The judgment must therefore be arrested.

CRAMPTON, J.

I concur. I am of opinion that this action is misconceived. If

E. T. 1856.
*Queen's Bench*
RICHARDSON
*v.*
CORCORAN.

an action be maintainable at all, it could only be sustained against the Commissioners personally. The action has been brought under the 94th section of the Towns Improvement Act; but it is utterly impossible to bring within the terms of that section the case now before the Court. It is not an action "for or concerning any con-"tract, matter or thing relating to any property, works or things "vested in them (the Commissioners), by reason of the provisions "of this Act;" nor is it "relating to any matter or thing whatso-"ever entered into or done by them under the provisions of this "Act." I need not therefore add anything to the plain exposition of the LORD CHIEF JUSTICE on this point; but I may advert to the cases cited to support the action. *Cane* v. *Chapman* (*a*) was an action on the case against the clerk of Commissioners, appointed under a Local and Personal Act; it was a case founded on a contract entered into between the Commissioners and the plaintiff. The plaintiff had advanced a sum to the Commissioners, for the purchase of an annuity; and by a grant, made according to the form of the statute, five Commissioners, by virtue of the Act, in consideration of the advance, granted to the plaintiff an annuity out of the rates. A quarterly payment of the annuity became due, and the Commissioners holding in their hands, out of the rates, money more than enough to satisfy it, the case stated that it became their duty to pay it; and they had not paid it. The Court held the action maintainable against their clerk for this breach of duty. Coleridge, J., says:—"Surely, the purchase of the annuity was some-"thing done by virtue of the Act; I think therefore that this "is a case within both the words and the spirit of the Act." Again:—"Now the declaration alleges that the annuity was "granted by virtue of the Act, in consideration of the advance; and "it could not be granted by virtue of the Act unless the advance "were made for the purposes of the Act." That case was, as I have said, founded on contract; and it appeared that the Commissioners had in their hands a sum of money sufficient for the plaintiff's demand. That case, however, went further than the subsequent case of *Edwards* v. *Lowndes* (*b*). Lord Campbell there

(*a*) 5 Ad. & Ell. 647. (*b*) 1 Ell. & Bl. 81.

says:—"We are not disposed to consider it an authority in any case in which the circumstances are not precisely similar." However, it does not apply to the present case, it being one of contract founded on the provisions of the Act; but the present is an action for a personal wrong committed by the Commissioners. Another case, *Kendall* v. *King* (*a*), was cited; but that also was an action of contract, where the "committee of visitors" were sued in the name of their clerk, in respect of a contract entered into by them; and the objection raised was, by what means a judgment had against them could be made available? Williams, J., says:—"It is "perfectly well settled that judgments so recovered are not to be "enforced otherwise than by mandamus, or by bill in Equity." I therefore think this action not maintainable.

MOORE, J.

I fully concur in the judgment.

Judgment arrested.

(*a*) 17 C. B. 483.

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## CONCANNON *v.* KELLY.

*Nov.* 23.

Where an action is brought asserting a title and the defendant does not dispute the title, but raises an issue of fact on which a verdict is found for the plaintiff for nominal damages, and the Judge certifies for the plaintiff's costs, the Court will not interfere with such decision of the Judge, it being made in the exercise of a discretion vested in him.

J. ROBINSON, on behalf of the defendant, moved that the costs in this case be referred for taxation.

This was an action for obstructing the plaintiff's water-course and a stream he was entitled to, for the purpose of working a mill. The defence admitted the plaintiff was possessed of the mill, and the other facts stated in the summons and plaint were not contradicted; and the issue was, whether the defendant diverted the stream? The jury found a verdict for the plaintiff, with one farthing

M. T. 1856.
*Queen's Bench*
CONCANNON
*v.*
KELLY.

damages, and the plaintiff's Counsel applied to the Judge to certify the costs, and he certified accordingly; having indorsed on the record this statement, "I determined that the plaintiff was entitled to costs."

We say he had no jurisdiction to make that order; if he had jurisdiction, of course we cannot call on the Court to say whether or not he exercised a sound discretion in making the order. The 243rd section of the Common Law Procedure Amendment Act 1853 enacts, "That in case the plaintiff in any action of contract (except "for breach of promise of marriage) shall recover, exclusive of costs, "less than £20, or in any action for any wrong or injury discon-"nected with contract (except replevin, or for slander, libel, mali-"cious prosecution, seduction or criminal conversation), a sum not "exceeding £5, the plaintiff in any such action shall be entitled "to no more than one-half of the ordinary costs, unless the action "has been brought for the purpose of trying a right to property "more extensive than the sum sued for." The 103rd General Order puts a construction on this section; "In cases falling within "the 243rd section of the Common Law Procedure Act (Ireland) "1853, the Judge shall, upon the application of the plaintiff, deter-"mine whether the plaintiff is entitled to full costs," &c.—[MOORE, J. The words "sum sued for," in the Act of Parliament, seem a mistake for "sum recovered."]—The 3 & 4 *Vic.* c. 24, s. 2, is the analogous English proviso, and on that the case of *Shuttleworth* v. *Cocker* (*a*) was decided. That was an action on the case, for a nuisance in carrying on an offensive trade, to which the plea was not guilty; and the Judge certified, though the plaintiff received less than forty shillings damages, that the action was really brought to try a right beside the mere right to recover damages, and that, therefore, the plaintiff was entitled to costs. But it was decided that, unless it appear from the declaration that the action could not really have been brought to try a right beyond the mere question of damages, the case is within the Act. We contend that the right of the plaintiff (which right we admitted) was not interfered with; for we cannot dispute that wherever the right might be tried on the record, the Judge has jurisdiction to certify. The Judge cannot

(*a*) 9 Dowl. P. C. 76; S. C., 1 M. & G. 829.

look to the evidence at the trial to see whether or not the certificate should have been given: *Morison* v. *Salmon* (*a*). There was nothing here to be contested but the measure of damages, and, therefore, the Judge had no jurisdiction.

*Concannon* and *M. Morris*, contra.

The Court have no jurisdiction to review what the Judge did at the trial as to certifying for costs, because the granting that certificate is entirely a matter for his discretion. But assuming even that the Court had that jurisdiction, the order made by the Judge was right. The verdict established that what the defendant did was an injury to the plaintiff; for their finding in effect was, that the defendant had no right to impede the working of the plaintiff's mill, and that the plaintiff was entitled to the free use of the water.—[CRAMPTON, J. The pleadings admitted the right.]—Merely the possession.—[MOORE, J. The question might be, whether incidentally the defendant could show his right, and in its exercise did he not injure the plaintiff? CRAMPTON, J. The defence concedes the right of the plaintiff to the mill and his right to the water, but says, "I, the defendant, did not disturb the right."]—In *M'Donnell* v. *M'Donnell* (*b*), on the trial of an action for trespass, at which the defendant did not appear, some evidence was given that the defendant asserted title to the premises at the time of the trespass, and the plaintiff took a verdict, with nominal damages, and the Judge refused to certify, under 2 *G.* 1, c. 11. Under the Procedure Act no certificate is required: *Toomy* v. *Garvey* (*c*); 16 & 17 *Vic.*, c. 113, s. 126.—[CRAMPTON, J. Suppose a judgment by default, and the plaintiff went down to trial on writ of inquiry, and one farthing damages given, what would be the result?]—He would be entitled to full costs.

*Morris* was stopped, and *Duggan* (who was with *Robinson*) was called on.

There is no report of the evidence before the Court, and no

(*a*) 9 Dowl. P. C. 387. (*b*) 3 Ir. Law Rep. 182.
(*c*) 9 Ir. Jur. 49.

M. T. 1856.
*Queen's Bench*
CONCANNON
*v.*
KELLY.

question of right or title was gone into before the jury. The defendant denies he did the specific act complained of.—[MOORE, J. Under the defence, might he not show that he had particular rights? I am not at all sure but that, under the issue tendered, the defendant might have proved he had a right to use the water, and that, in the exercise of it, he did not waste the water.]—If the defendant did not divert the water, or any part of it, he could not have wasted it. The English cases, as to costs in actions of this kind, have arisen on the plea of "not guilty," where the plaintiff could not know what the defendant's case was until the trial. The sole question here was as to the *quantum* of damages; and the case therefore, not involving any title or right, does not come within the 243rd section of the Common Law Procedure Act, and so the Judge had no power to certify.*

LEFROY, C. J.

We are of opinion in this case that we cannot deprive the plaintiff of what the certificate of the Judge entitles him to. The question is, had the Judge jurisdiction to give the certificate? The presumption of law is, that he would not have exercised it unless he had jurisdiction; and it is incumbent on the opposing party, who says he had not, to show he had no jurisdiction. What then does give the jurisdiction? The criterion is the purpose or object for which the action was brought. This action was to try a right; it lay on the plaintiff who brought the action to establish the right. Suppose the defendant had said nothing to the action, and that there had been judgment by default, could it then be said this was not an action brought to try a right? The plaintiff says he was owner of a mill situate on the stream, and, in right thereof, was entitled to the flow of water, and that the defendant interfered with and diverted the stream. The defendant does not assert a right; but he does not negative the plaintiff's right; for

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NOTE.—19 & 20 *Vic.*, c. 102, s. 97. "The plaintiff in any such action shall not be entitled to any costs, unless, at the trial of such cause, the Judge shall certify." 16 & 17 *Vic.*, c. 113, s. 126; and see *Hurford* v. *Kinsella* (8 Ir. Jur. 182.)

his defence is, that he did not divert or waste the water, or cause it to flow as in summons and plaint stated; he therefore admits the right of the plaintiff. A question might arise whether, under this loose form of pleading, the defendant would not be entitled to say at the trial, "I did not do the act wrongfully and injuriously; "because I had an older title than the plaintiff, I was entitled to "pen up the stream." There was a possibility of his so saying, and insisting on the elder right at the trial, on this form of pleading; and we are led therefore to the conclusion that this action was brought for the purpose of establishing a right.

CRAMPTON, J.

The plaintiff brings his action, claiming a right to have his water uninterrupted by a person higher up the stream. He brings his action for the purpose of trying this matter; the damages are merely incidental; but the defendant says the Court must look to the defence to ascertain why or for what object the plaintiff brought the action. That would be an erroneous test to try if it be a right that is in question; because if there were no defence, and the case went for trial on a writ of inquiry, then the plaintiff would maintain his action independent of anything the defendant might say as to whether or not the action was brought to try a right. The Judge has certified that the plaintiff was entitled to the costs; and we ought not to interfere with the Judge's discretion.

PERRIN and MOORE, JJ., concurred.

Motion refused, with costs.

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H. T. 1856.
*Exch. Cham.*

T. T. 1855.
*May* 31, *June* 1
M. T. 1855.
*Nov.* 7, 9.
H. T. 1856.
*Jan.* 16.

## Exchequer Chamber.*

## RODDY *v.* FITZGERALD.

(Error from the Court of Common Pleas.)

C. R., being seised of certain lands in fee-simple, and of others for lives renewable for ever, by his will, dated 21st September 1841, devised the freehold lands, subject to an annuity, to his son John, to hold to him during his life, and after his decease he devised the same to his lawful issue, in such manner, shares and proportions as John might, by deed duly attested, appoint; and in case of no such appointment, to his issue equally; and if only one child, to such only child; and in case of John dying without issue, he devised the said lands to his son William and his lawful issue, with like power of appointment as in the case of John; and on failure of such appointment, to such issue equally; and if only one child, then to such child; and in case of his son William dying without issue, he then devised the lands to his son Thomas and his lawful issue, with the like power of appointment, and with a like limitation to his issue in default of appointment; and if his son Thomas should die without issue, then he devised the said lands to his son Bernard, his heirs and assigns. The will then contained devises of two denominations of the fee-simple lands, in the like terms, to William, John and Thomas, in succession, and their issue, and of others to Thomas, William and John, in succession, and their issue, the ultimate limitation being in each case to Bernard, his heirs and assigns.—*Held, per* MONAHAN, C. J., PIGOT, C. B., TORRENS, PERRIN and JACKSON, JJ. (affirming the judgment of the Court of Common Pleas), that each of the sons took estates tail in the fee-simple lands, and *quasi* tail in the freehold.—[*Dissentientibus*, LEFROY, C. J., GREENE, B., MOORE, J., BALL, J., PENNEFATHER, B.]

This was an ejectment on the title, brought under an order of the Incumbered Estates Court, for the recovery of certain lands and premises. This order was made in the matter of *Francis Fitzgerald petitioner*, and *William Roddy respondent;* and the matter to be decided was, what estate William Roddy had in said lands? Whether an estate of inheritance which could be sold, or an estate for life?

The case was tried before MONAHAN, C. J., at the Sittings after Trinity Term 1853, on which occasion the jury found a special verdict.

That special verdict found that Charles Roddy was, at the time of making his will, and from thence up to the time of his decease, seised in fee-simple of the lands of Tonatygannon, Carardaghy, Drutany and Knockawelt, with a subdenomination called Golan; and that he was also, at the time of making said will, and from thence until his death, seised of a freehold estate for lives still subsisting and renewable for ever, in the lands of Carrigans and Clinumphy, with a subdenomination called Salcony—all situate in

* *Absentibus*, CRAMPTON, J., and RICHARDS, B.

the county of Fermanagh—subject to a devise for one life still existing, of eleven acres of the lands of Knockawelt, bearing date the 1st day of November 1801, reserving a yearly rent of £13. 1s., late currency; and that Charles Roddy, being so seised, did, on the 21st of September 1817, make his last will in writing, duly executed, &c.

The will of the testator, as set out by the special verdict, after a direction for payment of his debts, and after the gift of an annuity to his wife, and certain specific bequests, contained the following devise:—

"I give and devise to my son John Roddy the aforesaid lands "of Clinumphy and Carrigans, subject to the annuity of £50, "payable to his mother—to hold to him during his life; after "his decease, I give and devise the same to his lawful issue, in "such manner, shares and proportions as he may by deed or will, "duly attested, limit, direct and appoint; and in case of no such "appointment, then to his issue equally, share and share alike; "and if only one child, to such only child; and in case of my said "son John dying without issue, I give and devise the said lands, "subject as aforesaid, to my son William and his lawful issue, "with like power of appointment as before mentioned; and on "failure of such appointment, to such issue equally; and if only "one child, then to such child. And in case of my son William "dying without issue, I then give and devise the said lands, subject "as aforesaid, to my son Thomas and his lawful issue, with the like "power of appointment; and for want of such appointment, to his "issue equally; and if only one child, then to said child. And if "my said son Thomas shall die without issue, then I give and "devise said lands to my son Bernard, his heirs and assigns, for "ever."

The will then, after a bequest to his son Charles of an annuity of £10, payable out of the lands of Tonatygannon and Carardaghy, proceeded as follows:—

"And subject to said annuity, I give and devise the said lands of "Tonatygannon and Carardaghy to my son William during his life, "and after his death to his lawful issue, in such manner, shares and "proportions as he by deed or will, duly attested, shall direct, limit

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

"or appoint; and for want of such appointment, to his issue equally, "*if more than one;* and if only one child, to said child. And on "failure of issue of my son William, I give and devise said lands "last mentioned to my son John and his issue, with like power of "appointment; and in case of no appointment, to such issue equally; "and if only one child, to such child. And for want of issue of my "son John, I give and devise said lands to my son Thomas and his "issue, with the like power of appointment to my son Thomas; "and for want of such appointment, to his issue equally; and if only "one child, to the said child. And in failure of issue of my son "Thomas, I give and devise said lands to my son Bernard, his heirs "and assigns, for ever. I give and devise unto my son Thomas "the lands of Knockawelt and Drutany, in the county of Ferma-"nagh, for his life; and upon his death I give the said lands unto "his issue, in such manner and proportions as my said son Thomas "shall by deed or will, duly attested, limit, direct or appoint; and "for want of such appointment, to his issue equally; and if but one "child, to said child; and in failure of issue of my said son "Thomas, I give and devise said last mentioned lands to my son "William and his lawful issue, with like power of appointment; "and for want of such appointment, to his issue equally, and if "only one child, to said child; and on failure of issue of my son "William, I give and devise said lands to my son John and his "lawful issue, with like power of appointment; and for want of "such appointment, to his issue equally, and if but one child, to "said child; and failing issue of my son John, I give and devise "said lands to my son Bernard, his heirs and assigns, for ever."

The jury then found that Charles Roddy died on the 21st of November 1821, without having revoked his will, and that Bernard Roddy, named in the will, who was at the time of the date of the will the eldest son of the said Charles Roddy, died in the life-time of the said Charles Roddy, without issue; and that at the time of the death of Charles Roddy, William Roddy was his eldest surviving son, and heir-at-law; and that Thomas Roddy died in 1825, unmarried, without having had issue, and intestate, leaving William Roddy his eldest brother and heir-at-law him surviving.

They also found that William Roddy married in 1835, and had issue several children, one born in 1836, who died in the same year, the defendant Anne Roddy, who was born in 1837, and three other children, viz., the defendants Eliza Roddy, Charles Roddy and Jane Ellen Roddy.

They further found that William Roddy died on the 25th of April 1851, having duly made his will, dated the 28th of September 1850; whereby he devised to his four surviving children, the defendants, all his real and personal estate, equally to be divided amongst them, share and share alike; and that he had died without revoking his will, and that John Roddy, named in the will of the said Charles Roddy, died on the 4th of December 1846, intestate, and without having had issue, leaving William Roddy his eldest brother and heir him surviving.

The jury found that, by indenture of the 9th of August 1830, John Roddy conveyed to William Roddy, his heirs and assigns, a portion of the lands of Carrigans, and the lands of Clinumphy, for the life of John Roddy, subject to the payment of the annuity charged on the lands by the will of Charles Roddy; and that by indenture, dated the 25th of February 1831, reciting that John Roddy was tenant for life under his father's will, John Roddy conveyed to William Roddy, his heirs and assigns, a portion of the lands of Salcony and Carrigans, for the life of John Roddy.

The jury further found that the lands named in the two last mentioned indentures were the same lands as those devised by the said Charles Roddy, under the names of Clinumphy and Carrigans, and that said two indentures comprised the entire of said denominations, and were the same as those mentioned in the declaration in the present ejectment.

And they further found that, by indenture dated the 4th of September 1833, and made between William Roddy, of the first part, John Roddy, of the second part, Richard Jennings, of the third part, and Henry Fulton, of the fourth part, after reciting the will of Charles Roddy, and that Bernard Roddy and Thomas Roddy had died without issue, and that William Roddy was the heir-at-law both of Charles and Bernard, William Roddy conveyed to Jennings and his assigns Knockawelt, also the lands of Tonatygannon and

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

Carardaghy, to the intent that the said Richard Jennings might be a tenant to the *præcipe*, so that a common recovery might be suffered of the same, which it was declared should enure to the use of the said Henry Fulton and his heirs, subject, nevertheless, to a proviso for redemption thereinafter contained; and that in Michaelmas Term 1833, a recovery was duly suffered of the lands.

And the jury further found that, by indenture dated the 21st of October 1842, reciting that the said sum of £1500 had not been paid by William Roddy to Henry Fulton, &c., Henry Fulton and William Roddy conveyed to Robert Clifford, his heirs and assigns, the said lands of Tonatygannon, Carardaghy, Drutany and Knockawelt, subject to the same equity of redemption as the said William Roddy was then entitled to; and that by indentnre, dated the 1st of January 1847, William Roddy conveyed to Robert Clifford, his heirs and assigns, the said lands of Carrigans and Clinumphy.

The case was argued on this special verdict, before the Court of Common Pleas, in Hilary Term 1854, when that Court gave an unanimous judgment in favour of the plaintiff below, the defendant in error (*a*).

A writ of error having been brought on this judgment, the case was argued by—

*Mac Mahon* and *D. Lynch*, for the plaintiff, and *Francis Smyth* and *Deasy*, for the defendant in error.

*Cur. ad. vult.*

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*Jan.* 16.

The Court, differing in opinion, delivered judgment *seriatim*.

GREENE, B., having stated the facts, proceeded to say:—By the judgment of the Court of Common Pleas, upon this special verdict, that Court was of opinion that W. Roddy took an estate tail in the fee-simple lands, and an estate in *quasi* tail in the lands held for lives renewable for ever.

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NOTE.—The case was twice argued; first in Trinity Term, and a second time in Michaelmas Term 1854; and on the second argument the Court made an order that, in future, on the argument of every case in this Court, the Senior Counsel for the plaintiff was to begin, and to be followed by the Junior on the same side; the Senior Counsel for the other side was then to be heard, and to be followed by his Junior, and the Senior Counsel opening was to have the general reply.

(*a*) *Vide* 4 Ir. Law Rep. 74.

So far as relates to the former, the title of the mortgagee is clearly good; for whether W. Roddy took an estate in tail, or took only an estate for life, with remainder to his issue, as that remainder was contingent when the recovery was suffered, no issue having been then *in esse*, the recovery validated the title, either by its usual operation upon an estate tail, or by the destruction of the contingent remainder.

But as the effect of the recovery is admitted not to have been the same, as to the lands held for lives renewable for ever, so far as relates to the destruction of remainders, it is necessary to consider the construction of the will of Charles Roddy, so far as relates to that portion of the estates devised to William Roddy. I regret to say that, after a careful consideration, the conclusion at which I have arrived upon that question is different from that drawn by the Court of Common Pleas; and that, in my judgment, William Roddy took under this will no more than an estate for life.

It appears, from the report of the judgment below, that the Court thought that the estate for life expressly devised to William Roddy ought to be enlarged to an estate tail, on the authority of several cases, to which I shall presently advert; and more particularly of the well-known case of *Jesson* v. *Wright* (*a*). I agree with the judgment to this extent, that whatever estate the testator intended to give by the first class of devises, he meant to give in all, notwithstanding some trivial differences of expression. I also agree that the true question is, how we are to understand the word "issue," whether as a word of limitation, meaning issue indefinitely, in a course of legal succession, or as a particular class of issue, viz., as synonymous with "sons" or "children," or issue living at any particular period? in which latter case the LORD CHIEF JUSTICE admits that William would take only an estate for life. The LORD CHIEF JUSTICE is reported to have said, that if the words in this case had been "heirs of the body" instead of "issue," the case could not have been distinguished from *Jesson* v. *Wright*. But, in the first place, if the words had been "heirs of the body," it would have made a most material and important difference, as it

(*a*) 2 Bligh, 1.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

appears to me; and in the next place, even were we at liberty to read the word "issue" as "heirs of the body," yet the case would not necessarily be ruled by *Jesson* v. *Wright*, as I shall hereafter endeavour to show.

Again, it is stated in the judgment below, that there are several Irish decisions, without overruling which it cannot be held that William Roddy took less than an estate tail. When I come to refer to these Irish cases, I hope to establish that such a result as the overruling them will not follow from holding that no more than a life estate passed under the present will.

This leads to the inquiry, first, whether there is any decided case in all respects corresponding with the present, so as to rule it as a precedent? secondly, if not, what, according to the rule of law, to be extracted from the authorities as now judicially explained, ought to be the decision on the present will? It appears to me that none of the authorities cited, or which I have been able to discover, in which an estate was held to pass, is in all respects similar to the case before us. In none of them, so far as I can discover, are to be found united all the ingredients which this presents. They are five in number, viz., first, an express estate for life to the first devisee; second, a remainder given in express terms as a remainder, not to the heirs of the body, but to his issue; third, a remainder not to the issue generally, but to the issue in shares as tenants in common; fourth, the explanatory word "child," as descriptive of the issue, where only one; fifth, an estate in fee-simple, directly or by legal implication superadded to the limitation to the issue, so as to make them the stocks of distinct inheritances in fee, originating with them, and capable of transmission by descent from them. Some of the decided cases have more, and some less, of these several conditions; but none, I believe, all combined. I shall, as I notice them, advert to the features which are wanting.

With respect to that class of cases in which the limitation is to the heirs of the body of the first taker, and of which *Doe* v. *Goldsmith* (*a*), *Doe* v. *Smith* (*b*) and *Jesson* v. *Wright* (*c*), may be cited

(*a*) 2 Marsh, 517. (*b*) 7 T. R. 531.
(*c*) 2 Bligh, 1.

as instances, they are directly within the rule in *Shelley's case;* and I admit that where the technical words "heirs of the body" are used, they must have their legal construction and effect, unless the testator indicates, in the clearest possible manner, his meaning to be that they shall be understood in some different or more restricted sense. This, however, is because those words are technical, and such as bear a defined legal meaning. The construction and effect of them is a rule of law. In *Poole* v. *Poole* (*a*), Lord Alvanley says, in adverting to the words "heirs of the body," "The Courts have never deviated from the general rule, which gives "an estate tail to the first taker, where the devise to him is followed "by a limitation to the heirs of his body, except where the intent "of the testator has appeared so plainly to the contrary that no one "could misunderstand it." So also, in delivering the opinion of the Judges in the House of Lords, in *Fetherston* v. *Fetherston* (*b*), Tindal, C. J., says that such is the rule of law; and Lord Brougham, in the same case, thus expresses himself:—"Such is the force of "these words, such their clear tendency to give an estate tail, "that we may almost lay it down as a rule that no other pro-"vision of a will is sufficiently strong to overrule this tendency, "and make them words of purchase, which does not fall within "the first head of exception," *i. e.*, where the words are explained by the word "sons," &c. Where the limitation, therefore, is to the heirs of the body, words of superadded limitation, or words of distribution, or words of modification, have in several cases been rejected as insufficient to control the rule of law. But even the words "heirs of the body" may be so explained as to deprive them of their technical import, as in *Doe* v. *Laming* (*c*), where the devise was to the testator's niece A. C., and to the heirs male of her body lawfully begotten, as well females as males, and to their heirs and assigns, for ever; and it was held that A. C. took an estate for life only. In *Doe* v. *Smith* (*d*), Lord Kenyon does not deny the soundness of this decision, but distinguishes it from the case then before him, on the grohnd that there were superadded

(*a*) 5 B. & P. 627.
(*b*) 3 C. & F. 74.
(*c*) 2 Burr. 1106.
(*d*) 7 T. R. 533.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

words of limitation; but, as I have already stated, no case of limitation to the heirs of the body governs the present, where the limitation is to "issue." All the authorities agree that "issue" is a flexible word, and will be construed as a word of purchase or of limitation, as will best suit the testator's intention, to be collected from the whole will. It is not a technical word to which, as a rule of law, a particular signification is to be attached. Accordingly, words of explanation or of distribution, or of superadded limitation, which would not control the legal effect of the words "heirs of the body," have repeatedly been held sufficient to give the word "issue" the operation of a word of purchase.

This being so, we are to consider what the testator understood here by the term "issue." What is said by Eyre, C. J., in *Burnall* v. *Davy* (*a*), seems applicable:—"If this case were stripped of "authorities, I would inquire what was the intention of the testator, "as it appeared from the circumstances of his family, and the terms "of the will; and then I would examine the rules of law to see "how far the intention of the testator was consistent with them. An "anxiety to effectuate what has been considered as the leading inten-"tion of testators has introduced all the difficulty into this class "of cases." I think it is impossible to doubt that here the testator intended William Roddy to take only for life, and that he should have no more power over his issue than to fix their proportions and estates. All the issue are to take as tenants in common, simultaneously and not in succession. Females are to take as well as males. The estate which the law would give them as purchasers would be not an estate tail, but a fee. And the testator has himself used the word "child" as synonymous with issue. All this is inconsistent with an estate tail in the father. It is true that the testator also intended that the estate should not go over unless for default of the issue of William, contemplated in the first part of the will. And then the question is, can the intention that William should take only for life be carried out without violating any rule of law, and consistently with the other intention, that as long as the issue of William should continue, the ulterior devisee should

(*a*) 1 B. & P. 220.

not be entitled? In my opinion it clearly can. The anxiety to effectuate what has been considered the leading intention has (to use the language of Eyre, C. J.) led to all the difficulty in this class of cases. I think it appears from the recent decisions that this sacrifice of what has been termed the particular to the general intention has been in some instances carried further than is warranted by the rule on which they professed to be founded, as that rule was originally understood; and that there is now a disposition to *restore* the law to its proper limits and principles in this respect.

Before I advert to the cases which appear to me to be the strongest in favour of an estate tail, I may observe that the principle on which Lord Kenyon considered them to depend is not now considered the correct one, as see Lord Redesdale's judgment, (2 *Bligh*, p. 50), and Lord Denman's (5 *B. & Ad.*, p. 640). The rule, as justly observed by Lord Denman, is, properly speaking, a corollary from the rule in *Shelley's case*. As it was impossible in *Shelley's case* to hold that the ancestor should take for life, and at the same time that the heirs of the body should take as purchasers, just in the same way as if they had taken by descent, and therefore the ancestor's life estate must be enlarged to an estate tail, so where in other cases it appeared that the testator intended the ancestor to take for life, and yet that the issue should take a transmissible estate as purchasers, which latter intention could not be carried out, because the testator had omitted to limit to the issue such an estate in the character of purchasers, as should be descendible through them, the Courts necessarily felt themselves constrained to give to the issue, on the principle of a *descent*, that which they could not have on the principle of purchase, and consequently vested an implied estate tail in the first taker. The rule was based upon necessity, *i. e.*, the impossibility of effectuating inconsistent intentions. As the soundness of this view has been impeached in the discussion of the present case, I shall refer to two or three authorities in support of it.

In the leading case upon this subject, *Robinson* v. *Robinson* (*a*), this is distinctly stated as the ground. The language of the

(*a*) 1 Burr. 38.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

certificate is, "We are of opinion that Lancelot Hicks must, by "necessary implication; take an estate tail, in order to effectuate "the manifest general intent of the testator." So in *Denn* v. *Puckey* (*a*), Lord Kenyon himself, who perhaps carried the rule as far as any other Judge, says:—"It has been for a long time, and "very properly, settled, that if a devisor, ignorant of technical terms, "sitting down to draw his own will, make clashing limitations, the "Courts, in construing that will, must depart from some particular "limitations, in order to give effect to the general intention of the "devisor." So in *Doe* v. *Smith* (*b*), the same learned Judge says, "Where it appears in a will that the testator had a general in-"tention, and also a secondary intention, and they clash, the latter "must give way to the former." Again, in *Doe* v. *Cooper* (*c*), "Lord Kenyon uses this language:—"It has been the settled "doctrine of Westminster Hall, for the last forty or fifty years, "that there may be a general and a particular intent in a will, and "that the latter must give way when the former cannot otherwise "be carried into effect." But though the foundation of the rule be the clashing of the several clauses of the will, it has been in many instances loosely applied, where it was not necessary to sacrifice the particular intent, but it was possible to preserve it, and the general intent too. It is impossible to read the judgments of some of the most eminent Judges without seeing that this was their impression. In *Jesson* v. *Wright* (p. 50), Lord Eldon says that, assuming the principle to be a sound one, he cannot admit that all the cases have been well decided; that is, as I understand, that some of them cannot be supported even on the principle on which they profess to rest. Subsequent Judges have expressed similar opinions, and I think it probable that some of the cases in which estates tail have been held to pass would not now receive such a decision.

Having thus stated what appears to me to have been the origin of the doctrine to which I have adverted, I shall proceed to notice first the English and then the Irish cases which appear to have

(*a*) 5 T. R. 299. (*b*) 7 T. R. 533.
(*c*) 1 East, 234.

carried it to the greatest extent, and then in what respects they differ from that before us.

One of the principal is *Doe* v. *Grew* (*a*). The devise was "to "George Grew, for and during the term of his natural life; and "from and after his decease, to the use of the issue male of his "body, lawfully begotten, and the heirs male of such issue male; "and, for want of such issue male, then to George Dodson, his "heirs and assigns." This was held to give George Grew an estate tail, on this ground, as stated by Wilmot, C. J.:—"Though "the testator certainly intended, in the first instance, to give George "Grew only an estate for life, yet, if he as certainly intended that "all his sons should take in succession, one after another, and they "cannot take in that manner but by lodging an estate tail in George "Grew, then it comes to this case; here are two things intended, "one, an estate for life to G. Grew; another, an estate in succession "to all his sons in tail *in infinitum*. Can they both take place? "If they can, they ought; if they cannot, then balance the two "intentions, one against another, and see which is the weightiest "and most comprehensive, and give that effect." And again, "if "they take by purchase, they must all take as joint tenants for life, "and tenants in common of inheritance; but he intended all to take, "but in a course of succession." It is quite plain from this judgment, that it is inapplicable to a case where the devise is not to issue generally (*i. e.*, in a course of succession), but to issue share and share alike, to take simultaneously; nor, secondly, to a case where, by giving an estate tail to the father, an estate in fee given to the issue would be altered and cut down. In *Doe* v. *Aplin* (*b*), the devise was "to William Dymock for life, and after his decease to and amongst his issue, and in default of issue" then over. Here, though there were distributive words, there were no words of inheritance superadded to the word "issue," so that the issue, as purchasers, could only have taken for life, and thus the intention to continue the estate in that line would have been frustrated. This was the argument relied on at the Bar, and was manifestly the

(*a*) Wilmot's Cases, 272. (*b*) 4 T. R. 82.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

foundation of that decision. In *Denn* v. *Puckey* (*a*), the devise was to "N. W. for life, without impeachment of waste, and after his "decease to the issue male of his body, lawfully begotten, and to "the heirs and assigns of such issue male for ever; and in default "of such issue male, then to W. W." Here were no words pointing to more than one; it was a limitation to the heirs male severally and successively (as Wilmot, C. J., stated in *Doe* v. *Grew*), and so understood; the only mode of carying it out was by giving an estate tail to N. W. That case is plainly different from the present, even if it be considered a decision that N. W. took an estate tail. But it did not amount to such a decision; for if the children of N. W. took the fee as purchasers, it was a contingent remainder, and was barred by a recovery suffered by N. W.; and accordingly Lord Kenyon says, "*quacunque via*, without determining whether "N. W. took an estate in tail, or for life only, with a remainder "to the issue in fee, the lessor of the plaintiff is not entitled to "recover;" and the other Judges agreed that, either way, there must be judgment for the defendant. The case is, therefore, no decision on the present question. It was exactly like the present case, so far as it relates to the fee-simple lands, as to which this Court need not have expressed an opinion, whether the children of W. Roddy were issue in tail, or contingent remaindermen; because the recovery has, in either view of that question, extinguished their rights. The next case to which I shall refer is *Frank* v. *Stovin* (*b*). There the devise was "to B. F. for the term of his natural life, "without impeachment of waste, and with jointuring power; and "from and after his decease, to the issue male of the body of B. F., "lawfully begotten or to be begotten, and their heirs; and in default "of such issue, then over." It was certified that B. F. took an estate tail. No reasons are given; but the case differs from the present in the same respects as *Denn* v. *Puckey* and *Doe* v. *Grew*. In *Doe* v. *Goldsmith* (*c*), the devise was "to my son Francis "during his life, and after his decease to the heirs of his body "lawfully to be begotten, in such parts, shares and proportions,

(*a*) 5 T. R. 299. (*b*) 3 East, 548.
(*c*) 2 Marsh, 517.

"manner and form as he shall appoint; and in default of such heirs "of his body, then to J. G. in fee." The Court considered that the meaning of the testator was very obscure, but that the words "heirs of the body" should receive their technical signification, even though the testator mistook their meaning; and consequently that Francis took an estate tail. This case, therefore, is of the same class as *Jesson* v. *Wright;* and the testator did not use any word explanatory of his meaning, in using the technical words. Mr. *Jarman* observes on this case (vol. 2, p. 305), that much stress was laid on the devise over, as demonstrating a general intent that the estate was not to go over until a general failure of issue; but that it is difficult to understand how this intention could be rendered more distinctly apparent than by an express devise to those very objects. *Doe & Candler* v. *Smith* (*a*) was also strongly relied on by the Counsel for the defendant in error. It was a devise "to "Mary Ayscough and the heirs of her body, lawfully to be begotten, "for ever, as tenants in common, and not as joint tenants; and "in case she should die under twenty-one or without leaving issue "of her body lawfully begotten," then to R. A. in fee. It was very properly held that Mary Ayscough took an estate tail. Here were not only the words "heirs of the body," but there was no separate devise to M. A. herself, nor anything to cut down the legal effect or construction of the devise to the heirs of the body. Where the limitation is to heirs of the body, the principle now recognised is, that they create an estate tail, and that words added, either such as "tenants in common," share and share alike," &c., are to be rejected as repugnant: 2 *Jarm. on Wills*, p. 303, last edition. In *Doe* v. *Cooper* (*b*) the devise was "to Richard Cock for life only, and "after his decease to the lawful issue of the said Richard Cock, "as tenants in common; but in case the said Richard Cock shall die "without leaving lawful issue, then to E. H." Here was no limitation grafted upon that to the issue, and it was held an estate tail in Richard Cock; because the general intention that the estate should not go over until failure of his issue could not otherwise

(*a*) 7 T. R. 531. (*b*) 1 East, 229.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

be carried into effect. Lastly, in *Jesson* v. *Wright* (*a*), there were no words of inheritance supperadded to the limitation to the issue, who, therefore, as purchasers, could only have taken for life.

I believe I have now adverted to the strongest English cases which were cited in the argument in support of the construction of an estate tail in William Roddy, with the exception of one to which I shall subsequently refer. I shall now proceed to consider the Irish decisions. It was considered below, the consequence of holding that William Roddy took only for life would be to overturn a series of authorities decided in the Irish Courts. I should be sorry to hold an opinion which would have such an effect. It will, however, be found, if I am not mistaken, that none of those cases is similar to the present, and that only one approaches closely to it in its circumstances.

The first case to which I shall advert is *Irwin* v. *Cuffe* (*b*). The devise was "to Olivia Irwin for life, without impeachment of "waste; and from and after her decease, in trust for her issue male "and their issue male, in such manner as the said Olivia should "appoint; and in default of such issue male, then to Henry Irwin," &c. Now here, first, no estate was given to the issue in default of appointment. Secondly, it was no more than a devise to Olivia for life, remainder to her issue male and their issue male, which clearly carried an estate tail. Thirdly, there were no words of distribution, as "to and amongst," showing that more than one were to take. Fourthly, there was no such word as "child," to restrain the indefinite meaning of "issue male." Fifthly, the nature of the estate given to the issue was not inconsistent with an estate tail in the parent. In *Briscoe* v. *Briscoe* (*c*), the devise to John, Robert and Edward Whitty, as tenants in common during their respective lives, equally to be divided between them, without impeachment of waste, and from and after their respective deaths to the use of the lawful issue male of the bodies of John, Robert and Edward Whitty respectively, in such shares and proportions, if more than one son, and such incumbrances for a daughter or

(*a*) 2 Bli. 1. (*b*) Hay. 30.

(*c*) Hay. 34.

daughters' portions as John, Robert and Edward Whitty respectively, by deed or will, should limit and appoint to such their sons and daughters; and in case any of the said John, Robert or Edward should die without issue male or female, then, as to the share of John, to the use of Robert and his lawful issue male, with like power of dividing same amongst his sons, or charging it for daughters: then followed cross limitations of the like nature as to the other two shares, it being the testator's intention that the said lands should continue with his said three sons and their lawful issue male, subject to daughters' provisions, while any male issue should remain of his said sons. This was properly held to be an estate tail. But what analogy has that case to the present? The testator had in express terms said, "I mean all the male issue, so long as there are any, to succeed their father;" and yet he gave the issue, as purchasers, no estate of inheritance; the father, therefore, must take an estate tail. In neither of these cases are any reasons assigned for the judgments; but those judgments are undoubtedly correct, on the grounds which I have stated. In *Croly* v. *Croly* (*a*), the devise is to "Richard, for and during the term of his natural life, and from and "after his decease to the use and behoof of his issue male and female, "in such proportion or proportions as he should think fit by his last "will to devise the same; and in case Richard shall die leaving no "issue male or female," &c. No reasons are given here; but the decision was quite proper, because there were no superadded words of limitation to the issue, and they could only take through the ancestor; and such was the argument, and such, no doubt, was the reason of the certificate. In *Whitsitt* v. *Thompson* (*b*), the words are, "I give and devise to my said son all my freehold and lease-"hold estates, and to his issue male and female, in such shares, "manner and proportion as he may by deed or will appoint, &c.; "and in case of the death of my said son without lawful issue," over. Clearly this was an estate tail; there was no express devise for life to the son; it was to the son and his issue male and female: this has been repeatedly ruled to be an estate tail, and no doubt it is.

(*a*) Rat. 1. (*b*) 12 Ir. Eq. Rep. 119; S. C., 1 Ir. C. L. Rep. 633.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

*Martin* v. *M'Causland* (*a*) is the case to which I alluded as the only Irish one with which a reversal of the present judgment would most nearly appear to conflict. The devise in that case was this:—"I leave and bequeath to my son Robert M'Causland, during "the term of his natural life, all my estate, right, title and interest in "the lands of C; and in case my son Robert shall marry with the con-"sent of his mother, if living, then I devise the same to any issue he "may happen to have by his wife, in such manner as he shall by deed "or will direct, limit or appoint; and for want of such appointment, to "go equally among them, share and share alike; but in case my said "son Robert shall die without issue," then to testator's son Marcus. The Court of Common Pleas held that under this devise Robert took an estate tail. I admit that here was an express estate for life, also words tantamount to words of distribution, and also words sufficient to vest in the issue of Robert, as purchasers, an estate of inheritance; and also that the word was "issue," not "heirs of the body;" and that in all these respects the case resembles the present. There is, however, this distinction, that the testator did not there interpret the word "issue" by the use of the word "child." This distinction is not unimportant; for that circumstance was relied upon as distinguishing the case from others cited, in which an estate for life only was held to pass. I do not, therefore, consider the case of *Martin* v. *M'Causland* as in all respects a precedent for this.

I may here refer to the case of *North* v. *Martin* (*b*), where, by a settlement, lands were limited to husband and wife for their lives, remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one, equally to be divided among them as tenants in common; and for default of such issue, to the wife and her heirs. Sir J. Leach, Vice-Chancellor, held that, but for the interpretive words, the husband would have taken an estate tail; but that they restricted the words "heirs of the body;" and he held further, that the limitation over, in default of such issue, must be understood as confined to the issue previously described.

(*a*) 4 Ir. Law Rep. 340. (*b*) 6 Sim. 266.

It is remarkable that this case of *Martin* v. *M'Causland* was not relied on in *Montgomery* v. *Montgomery* by the eminent Counsel who argued for an estate tail, nor do I find it adverted to in the late edition of *Jarman on Wills*. My Lord Chief Justice Doherty is reported to have said:—"We think the words here "used by the testator intimate a general intention that the estate "should not go over to his son Marcus, until an indefinite failure "of issue of Robert; this being so, we only follow the current of "authorities from *Robinson* v. *Robinson* to *Jesson* v. *Wright*, "in holding an estate tail to be vested in Robert. Being satisfied, "as we are, that it was the general intention of the testator to "give Robert an estate tail, we are of opinion that, in order to "cut down that estate, it would, in the words of Lord Eldon, in "*Jesson* v. *Wright*, be absolutely necessary that a particular in-"tent should be found to control and alter it, as clear as the general "intent here expressed." Now, with the utmost deference to the very distinguished Judge who is thus reported, the reasoning applying to a devise for life, remainder to the "heirs of the body" of the devisee cannot be strictly used with respect to remainder to issue. Again, when the learned Chief Justice says that when it is once "ascertained that an estate is not to go over until after "an indefinite failure of issue of the devisee for life, the estate of "that devisee must be enlarged to an estate tail," he appears to have lost sight of an element always attended to in these cases, and essential to the position, viz., the want of a limitation of estate of inheritance to the issue as purchasers: for if the estate be thereby kept in the line of the issue of the devisee for life, the necessity of enlarging the express estate for life ceases to exist.

I am disposed to think that this case went farther than any of the English authorities, except, perhaps, *King* v. *Burchell* (*a*). In that case, John Blunt devised "to his cousin John Harris, second son of "Thomas Harris, by his sister Sarah, for life, remainder to the issue "male of John Harris, and to his and their heirs, share and share "alike, and, for want of such issue, to the issue female of John Harris, "and her and their heirs; and for want of such issue, to William

(*a*) Amb. 379; S. C., 4 T. R. 296, *n.*; 1 Eden, 24.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

"King, his heirs and assigns for ever." The estates devised in these words were estates in the parish of Hunton and Linton, in Kent. Here, no doubt, were an express estate for life, a remainder to issue, "not heirs of the body," words of distribution, and superadded words of inheritance: *i. e.*, in all respects the ingredients in the present case, save one, that is, that there was no such expression as "child" to indicate the testator's meaning in using the word "issue." But then (according to the report in *Ambler*, and both the other Reports) followed a devise of other premises at Maidstone, in these words, "to John Harris for life, remainder to the issue male of the "body of John Harris, and to their heirs; and for want of such issue, "to William King, his heirs and assigns for ever." It will be observed that in the latter devise, the words "share and share alike" do not occur; that is, there was nothing to extend "issue male" beyond a single person. Now, according to the report in *Ambler*, the question arose upon recovery suffered by John Harris, of the Maidstone premises. If this be so, the case was clearly within former authorities, viz., than an estate to one for life, with remainder to his issue male generally, and their heirs, is an estate tail. In this view of the case, it is no authority in support of *Martin* v. *M'Causland*, or of the present judgment. Understood as a decision of any greater extent than I have suggested it to be, it is not too much to say, after the observations made upon it in several modern cases, that *King* v. *Burchell* is to be considered as not a satisfactory authority. Mr. *Fearne* (p. 164) says, it was "a pretty strong case," a rather significant expression, and seems to rest the decision upon the proviso, that if J. H. or his issue should alienate, &c., they should pay a sum of money, as indicating an intention that the issue should not take in fee. It is enough, however, at present, to say that the language of the will in that case, as in *Martin* v. *M'Causland*, is distinguishable from that in the will before us, and, consequently, that a different decision in this case will not necessarily overrule either of the others.

Let us now see whether we do not run the risk of encountering well-considered and established cases in England, by holding that William Roddy took more than a life estate. In *Loddington* v.

*Kime* (*a*), the devise was to Evers Armyn for life, without impeachment of waste; and in case he should have issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then to Sir T. B. in fee. It was held that E. A. took for life only, with a contingent remainder in fee to his issue male. I cannot distinguish that case from this. It may be said that the word "his" indicated an eldest son, as purchaser. But I think that, so far from this circumstance being an argument in favour of an estate for life in the ancestor, it is rather the other way; for, suppose three or four sons, the eldest (if issue male be confined to one) would take all, and the others nothing, and so some issue would be unprovided for, unless the ancestor took an estate tail. *Loddington* v. *Kime* is recognised as law in recent cases; amongst others, in *Montgomery* v. *Montgomery*. In *Doe* v. *Collis* (*b*), it was held that "issue" is a word of limitation or a word of purchase, as will best effectuate the testator's intention. In that case the devise was to testator's two daughters, to be equally divided between them, viz., one moiety to Eleanor and her heirs for ever, and the other moiety to Susanna for life, and after her decease to the issue of her body lawfully begotten, and their heirs for ever; and it was held that Susanna took only for life. In *Greenwood* v. *Rothwell* (*c*), the devise was to J. G. during his life, and, from and after his decease, to all and every the issue of the body of J. G., share and share alike, as tenants in common, and the heirs of such issue. It was held that J. G. had only a life estate; and the Master of the Rolls acted on the certificate (*d*). *Crozier* v. *Crozier* (*e*) is a case similar. *Slater* v. *Dangerfield* (*f*) was a devise to G. D., for and during the term of his natural life, and from and immediately after his decease to all and every the lawful issue of G. D., their heirs and assigns for ever, as tenants in common, and not as joint tenants, when and as they shall attain twenty-one. Held, that G. D. took only for life. The decision is distinctly grounded on the distinction between the word "issue," and "heirs of the body."

(*a*) 1 Ld. Raym. 203; S. C., 1 Salk. 224.
(*b*) 4 T. R. 294.
(*c*) 6 Scott, N. R., 670.
(*d*) 6 Beav. 492.
(*e*) 3 D. & War. 373.
(*f*) 15 M. & W. 263.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

A very high authority on this part of the case is *Lees* v. *Mosley* (*a*). It was a devise to H. J. for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as the said H. J. should by deed or will appoint; but in case he should not marry and have issue who should attain twenty-one, then to O. In this case it was held that H. J. was tenant for life. I think these cases very clearly show that where there is a devise to one for life, remainder to his issue in shares and proportions, with words of limitation in fee to such issue respectively, the first devise gives only a life estate, where there is no devise over, in failure of issue of the first taker.

I have now to consider the effect of such a devise over, and whether it can have the effect of altering the estate given to the issue, and enlarging that given to the ancestor; and I think the authorities show that it will not; and that instead of the devise over explaining or controlling the previous limitations, the latter, on the contrary, will explain the devise over. I shall first take cases in which the words were indisputably words of purchase. Thus in *Ginger* v. *White* (*b*), there was a devise to John for life, and, after his decease, to the male children of John, successively one after another, as they are in priority of birth, and to their heirs and assigns; and, in default of such male children, to female children; and in case John shall die without issue, then to J. M. in fee. It was argued that the effect of this devise over was to make John tenant in tail; but it was held that "issue" in the devise over must be construed with reference to children, and that John was only tenant for life. The same rule prevailed in *Goodright* v. *Denham* (*c*). It is needless, however, to do more than refer to the late well considered case of *Foster* v. *Hayes* (*d*).

Let us now consider the cases in which the words are not clear words of purchase, as "son" or "child," but "issue," or other words capable of either meaning. And it is in my opinion fully established that if the general scope of the will shows that such latter words were used as words of purchase, a devise over in default

(*a*) 1 Y. & C. 589.
(*b*) Willes, 348.
(*c*) Doug. 264.
(*d*) 2 E. & B. 27; S. C., 4 E. & B. 717.

of issue (whether the word "such" is used or not) is considered to make no difference, and will not make the person whose failure of issue is referred to tenant in tail. Even in a settlement, as in *North* v. *Martin* (*a*), estates were limited to the wife and the husband for their lives, remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one, to be equally divided between them as tenants in common, and there was a remainder over in default of such issue; held that this did not give an estate tail to the husband, but must refer to "children." *Doe* v. *Reason* (*b*):—"I devise all my messuages in L. to Eliz. "Croson for her natural life, without impeachment of waste, and "immediately after her decease I devise the same unto such issue "of the body of E. C. as shall be then living, and to the heirs "of such issue; and if there shall be only one such issue or child "of the body of E. C., then I give the whole to that one and its "heirs, and if only two children, then to those two and their heirs "equally, to be divided between them as tenants in common; and "in case E. C. shall die without issue of her body then living, or in "case all such issue shall die without issue, so that all and every "the descendants of her body shall be dead without issue, then I "devise the same to my cousins B. & F." It was held that E. C. took only for life. This devise over was very strong. *Hockley* v. *Mawbey* (*c*) was a devise to testator's son and his issue lawfully begotten, or to be begotten, to be divided among them as he should see fit; and in case he should die without issue, then that the estate should be sold, and the produce applied in a certain way. The son was held to take only for life. This case, although sometimes questioned, has been recognised by the latest authorities. In *Tarrant* v. *Nicholls* (*d*), testator devised the residue of his estates, as to one moiety, to pay the interest to his daughters during their lives, and, from and after the respective deceases, then as to the principal, in trust for all and every the respective issues of his said daughters, whether sons or daughters, living at the respective deceases of his daughters, in equal shares, to be paid, if a son, at twenty-one,

(*a*) 6 Sim. 266.
(*b*) Cited 3 Welford, 242.
(*c*) 1 Ves. jun. 143.
(*d*) 9 Beav. 327.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

and if a daughter, at twenty-three; but if any of her said daughters should depart this life without leaving any such issue, or, having left any issue, all such issue should depart this life before attaining those respective ages, then, as to the share of such daughters as should die without leaving any issue, in trust for the surviving daughters. It was held that "*any* issue" meant the issue before pointed out, viz., sons and daughters. The Master of the Rolls said that when the case is doubtful, that construction shall prevail which most benefits the testator's family generally, on the supposition that this must more nearly correspond with his intention. So in the present case, I would adopt a construction which will benefit the family generally, and not sacrifice all to the father. In *Montgomery* v. *Montgomery* (*a*), Sir E. Sugden considers the gift over on failure of issue to be referrible to the issue already mentioned. There was there a devise to W. Montgomery during his natural life, and no longer, "unless it shall so happen that my said son shall survive his "present wife and marry a second or other wife, by whom he shall "have lawful issue living at his death; and then and in that case, "if it shall so happen, I leave, &c., my part of the said lands "of A, upon the death of my son, leaving issue male of such second "or other marriage, to such issue male, share and share alike; and "for want of issue male, to the issue female of such second or other "marriage, share and share alike; and in case it shall so happen "that my said son shall die without leaving any such issue of a "second or other marriage, then I devise said towns and lands "to my two grandsons." Sir E. Sugden held that the words "my part" were sufficient to pass the whole fee to the issue as purchasers. This case was attempted to be explained away, on the ground that the devise over was upon the *general* failure of issue, whereas the estate tail, if any, to be implied in William Montgomery, would be an estate in tail special, *i. e.*, to him and the heirs of his body by an after-taken wife. It was said by Counsel that, to have implied an estate in tail general would be to let in the issue by the first marriage, whom the testator was anxious to exclude. But this is quite fallacious: the question was, whether William Montgomery

had any species of estate tail? for if he had, the plaintiff would have succeeded. The effect of this decision is, that a devise to one for life, with remainder to his issue in shares, vesting in such issue either directly or impliedly a fee-simple, only gives the first taker an estate for life, notwithstanding a clause giving the estate over in default of his issue generally; and this, because there is no necessity to enlarge the life estate, or to sacrifice either the particular or the general intention. That this is the true principle appears from *Kavanagh* v. *Moreland* (*a*). If the Vice-Chancellor be well founded in what he says, it decides the present case. But it is argued that inasmuch as the Vice-Chancellor held in that case that the first taker had an estate tail, his language, to which I have referred, was extra-judicial. This I cannot admit: I do not conceive that what the Judge assigns as the cause or ground of his decision is extra-judicial. But it is then said, the Vice-Chancellor laid down a novel doctrine; I apprehend not: it is, as I conceive, the original doctrine established by a series of former authorities.

*Doe* v. *Burmall* (*b*) was a devise of all testator's estate to A and the issue of her body, as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving issue, then it was held that A took for life only, and that all the limitations subsequent to that to A were contingent, and destroyed by a recovery suffered by A. Lord Kenyon says:—"If the plaintiff's Counsel had succeeded in proving "that there was nothing to be collected from the will to show that "the children were to take only for life, then, according to the "case of *Roe* v. *Grew*, the Court would have endeavoured to convert "the estate of A into an estate tail, in order to effectuate the inten-"tion of the testator. It has been argued that the words in the will "are only sufficient to give an estate tail to her children; but I think "there is enough in the will to carry the fee to them." Here Lord Kenyon distinctly says, "that because there was not enough to pass the fee to the children, they were not purchasers."

In *Doe* v. *Harvey* (*c*), the devise was of testator's real estate to

(*a*) 1 Kay, 16.

(*b*) 6 T. R. 30.

(*c*) 4 B. & C. 611.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

Thomas Chapman for life, remainder to and amongst the heirs of the body of T. C., as well female as male, to take as tenants in common, and not as joint tenants; and, for default of such issue, to trustees, for 500 years, in trust, after the death of T. C., in case he shall die without issue of her body lawfully to be begotten, to raise £300 for Anne Chapman, sister of Thomas, for her support until she should attain twenty-one, in case T. C. shall happen to die without issue before she attains the age of twenty-one; and then, in case of the death of T. C. without lawful issue, to pay her the £300, and, subject to the term, he devised to J. C. and C. C., for their lives, and, after their respective deceases, to and amongst all and every the heirs of the respective bodies of J. C. and C. C., &c. When the case was first before the King's Bench, under the name of *Doe* v. *Covell*, in Easter Term 1816, the clauses relating to the creation of the term were omitted in the statement submitted to the Court; so that the limitations stood, "to T. C. for life, remainder to "the heirs of his body, female as well as male, as tenants in com-"mon; and for default of such issue, then to J. C. and C. C." In this state of things, the word "estate" was considered to carry the fee to the issue of T. C., and accordingly he was held to be tenant for life only; but, upon the subsequent discussion of the case, it was thought the provisions in the will, then for the first time introduced, showed that the word "estate" did not carry the fee, and therefore T. C. was ultimately held to be tenant in tail. No case can show more clearly than this the contrast between those cases in which a fee is given to the issue, and those in which, for want of superadded words of limitation, they would take only for life. Sir E. Sugden had, in the case of *Ryan* v. *Cowley* (*a*), laid down the like doctrine, and put the decision in *Jesson* v. *Wright* upon that distinct ground, viz., the want in that case of any words to carry more than a life estate to children considered as purchasers; and again, in *Crozier* v. *Crozier* (*b*). So in *Woodhouse* v. *Hernell* (*c*), Vice-Chancellor Wood emphatically repeats the language which he used in *Kavanagh* v. *Moreland*.

(*a*) Ll. & G., *temp*. Sug., 7. (*b*) 3 D. & W. 381.
(*c*) 1 K. & J. 352.

How is the law summed up in 2 *Jarman on Wills*, last ed., pp. 371, 2?—"Where words of distribution, together with words "which carry an estate in fee, are attached to the gift to the issue, "the ancestor takes for life only; and the result is the same, whether "the fee be given by the technical words 'heirs and assigns,' or by "such words as 'estate,' 'part,' 'those,' &c., occurring in the de-"scription of the subject of gift, or words imposing a pecuniary "charge upon the issue; and whether the gift to the issue be direct, "or by implication from a power to appoint to them, and whether "there is a gift over on general failure of issue of the ancestor "or not." Now, is the law here laid down supported by the authorities, or is it not? In my opinion, it is fully and clearly so; and then there is an end of the question here; for here is an express estate for life to W. R., with a remainder to his issue distributively, and an estate in fee to each of them; for this is the effect of the words "in such manner" in the power. This is clear from *Rex* v. *Marquis of Stafford* (*a*), *Crozier* v. *Crozier* (*b*), and other cases.

And here I must advert to a passage in the judgment below in the present case. The CHIEF JUSTICE distinguishes the case of *Lees* v. *Mosley* from the present, on the ground that, in *Lees* v. *Mosley*, the word "heirs" was superadded to the word "issue," "not as here (says my LORD CHIEF JUSTICE), where the word 'issue' is not followed by words of limitation." This, however, I conceive to be an error; for there are here words amounting to superadded words of limitation, *i. e.*, an implied estate in fee-simple given by the law to the issue. Another ground of distinction between the present case and *Lees* v. *Mosley*, relied upon by the CHIEF JUSTICE below, was the special nature of the limitation over in the latter case, viz., in case the son did not marry and have issue, who should attain twenty-one. Now, a little attention to the judgment of Baron Alderson will show that this special limitation over was regarded as of value only as indicating an intention that the issue should take a fee; and Baron Alderson says that cannot affect the case, because the issue had a fee expressly limited

(*a*) 7 East, 521. (*b*) 3 D. & W. 373.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

to them already; so that it was not the nature of the devise over that was the basis of the decision, but the estate in fee (no matter how inferred) vested in the issue. I cannot therefore see any distinction between this case and *Lees* v. *Mosley*, by reason of the nature of the limitation over in that case.

That no estate will be vested in the first devisee, greater than a life estate, unless there be a clear necessity for it, is further evidenced by a class of cases which decide that where an estate for life is given to the father, and a remainder to his issue, for life or in tail, and there is then a limitation over in default of issue of the father, so as to create an estate tail in him by implication, that estate tail will be only an estate in remainder, expectant on the previous life estate or estate tail in the issue: as in *Doe* v. *Hally* (*a*), *Parr* v. *Swindalls* (*b*) and *Doe* v. *Gallini* (*c*).

It has been argued in this case, as in many others, that, unless we imply an estate tail in William Roddy, a case might exist in which a child or descendant of William Roddy might be left unprovided for. Such an event might certainly happen in one of two ways; first, in the event of a child of William Roddy surviving the testator, and then dying during his father's life, leaving a child; or secondly, in the event of a child of William Roddy dying in the testator's lifetime, leaving a child. Now, in the first of these two cases, the grandchild of William Roddy would not be unprovided for, according to my construction of the will; for his father would take a vested estate in remainder in fee, which would descend to him; and, in the second event, the argument may be met by the observations of Sir John Leach, in *Malcolm* v. *Taylor* (*d*). He says:—"The objection to this construction is, that if a son "married and died under twenty-one, leaving a child, such child "would take nothing; and I agree that it is probable that, if "the possibility of such an event had occurred to the testatrix, "she would have provided for it; and the inquiry then is, whe-"ther the testatrix used the words 'dying without issue,' in order

(*a*) 8 T.R. 5.
(*b*) 4 Russ. 283.
(*c*) 5 B. & A. 621; S.C., 3 A. & E. 340.
(*d*) 2 R. & M. 421.

"to provide for that event?" And, in *Doe* v. *Gallini* (*a*), Tindal, C. J., says:—"It is objected, against this construction, that, "if the estate tail is given to the grandchildren as purchasers, and "one of them had died in the lifetime of the testator, and had left "issue, that issue could not have inherited; but the devise, as to "such grandchild, would have altogether failed as a lapsed devise. "It may be admitted that such would be the consequence; but "it is to be observed, in reply, that, as this supposed event takes "place in the lifetime of the testator, it was open to him to make "such new disposition of his property as he might think fit, on this "change in his family taking place; and the argument therefore is "not entitled to the same weight as where the construction put upon "a will is such that a failure in the manifest intention of the testa-"tor must necessarily follow, by an event which takes place after "his death, at which time he can have no control over, and no "means of applying a remedy to, the contingency which has taken "place."

It has also been argued that the fact of the limitations of three classes of estates to the three sons respectively, and the devise to the eldest son, being only in the event of failure of issue of those younger sons, makes this a peculiar case, as clearly indicating the general intention that the estate should not, in any other event, go over to the heir. I cannot see that this at all alters the complexion of the case, or that it can be viewed otherwise than as it would were there only one estate devised in the terms of the will.

Another argument was, that the devise over showed that the other sons and the heir should have the estate, which they could not have if the issue as purchasers took estates in fee; but that is sacrificing the first objects of the testator's bounty to secondary objects. It is for the sake of the first objects, and not of the substituted or ulterior objects, that the estate of the first taker is enlarged by implication.

Upon the whole, I think that by holding William Roddy to have taken for life, with remainder in fee to his issue as tenants in common, we effectuate every intention of the testator, violate no rule of

(*a*) 3 A. & E. 353.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

law, and overrule no case directly applicable to the present. I therefore am of opinion that the judgment of the Court below should be reversed.

MOORE, J.

In this case I concur in the opinion of my Brother GREENE. The will has been so fully stated by him that it is unnecessary for me to re-state it, and I shall only shortly refer to those parts which appear to me to support the opinion I have formed. In the course of the argument, very many cases were cited by the Counsel on each side, and they have been all fully analysed and commented on by my Brother GREENE; and as I fully concur in his exposition of them, I think it would be a very idle waste of time in me to go over again what he has already so clearly expressed. I shall, therefore, only state the general principles which appear to me to be applicable to this case, and refer only to those portions of the will which, in my opinion, bring this case within the principle I shall enunciate.

I think that whenever a will is brought under the consideration of a Court, the first duty is to ascertain from it what was the intention of the testator, and to give effect to that intention so far as is consistent with the rules of law. It has frequently happened, and will necessarily frequently happen, that in a will there may be inconsistent and contradictory intents. In such cases it is impossible to give effect to the entire will, and the course taken by the Courts has been to ascertain what was considered to be the general and prevailing intent, to give effect to it, and thereby to sacrifice the particular, less important and inconsistent intent. It constantly happens that in wills the testator has used words which have a legal signification, such as the words "heirs of the body," and "issue of the body." The Court is bound to give such words their legal signification, unless it appears clearly from other portions of the will that the testator did not intend to use them in their technical legal sense. But I think it plain, that if such intent does clearly appear, the Court is bound not to give those words their technical meaning. I think it is also settled by authority, that although the word "issue" occurring in a will is in its ordinary sense a word of

limitation, yet that it is not so expressive a word of limitation as the words "heirs of the body," and that the word "issue" can be more easily construed to be a word of purchase than the words "heirs of the body."

In the present case there is, after the devise to William for life, a devise to the issue of William; and I am bound to consider that word "issue" as a word of limitation, unless I am able to show by other parts of the will that the testator intended to use the word as a word of purchase, and not as a word of limitation. The first devise is to William for life; and certainly, to a person not learned in the law, that devise would be considered as a clear indication of intention that William should only take an estate for life. There are, undoubtedly, many cases in which the intention to give an estate for life has been made to give way to some more important intention of the testator; and if there was nothing in this will beyond the the devise for life, I would be bound by the authorities to say, that it alone would not prevent William from taking an estate tail; but still the express devise for life is to have its weight.

The next devise is to the issue of William in such manner, shares and proportions as William should think fit. It is very true that a power of distribution among his children is not necessarily inconsistent with an estate tail in William, and it has been decided that such a power may be annexed to an estate tail. But yet if the power be exercised, the property would go in a different manner and for a different estate from what it would have gone if there was an estate tail with such power. The estate tail would go undivided to the eldest son of William, and he would take only an estate tail. But if the power was fully exercised, all the children would take shares, and for larger estates than an estate tail. I acknowledge that I would be bound by authority to say that the existence of such a power would not of itself prevent the word "issue" from being considered a word of limitation, and thus conferring an estate tail on William; but still I think it must be considered as in some degree indicative of an intention not to create an estate tail in him.

But what is the next limitation? It is this; that in default of

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

appointment under the power, the property was to go among the issue equally, share and share alike. And it is settled by authority that the estates which the issue would take in default of appointment would be as extensive as could be given to them under an exercise of the power; that is, the issue would take the entire interest which the testator had, to be divided among them equally as tenants in common. This limitation is clearly inconsistent with the construction that gives an estate tail to William, and furnishes to my mind the strongest indication of an intention of the testator that William should not take an estate tail, and that the testator did not intend to use the word "issue" as a word of limitation, but as a word denoting the "children" of William who were to take as purchasers. This view is, in my opinion, powerfully confirmed by the next devise, which is, "that if there be but one child, then to that child," who would be entitled on the death of William not merely to an estate tail, but to the absolute and entire interest of the testator in the property. In the case of *Ryan* v. *Cowley* (*a*), Lord St. Leonards decided, from the mere use of the words "child" and "children," that there was a sufficient indication of intention to cut down the word "issue" from a word of limitation to a word of purchase. His Lordship considered that the testator had himself translated the word "issue," and shows that by them he meant children. So in the present case, the use of the word "child," if but one, shows that in the limitation to the issue he meant "children." And combining this with the limitations to the issue in default of appointment, which are inconsistent with an estate tail, and with the express estate for life to William, I have arrived at the conclusion of a clear intention in the testator that William should only take an estate for life.

Two matters have been urged against this construction, to which I must advert. The case has been put, of a child of William's dying in his lifetime, leaving a child or children; and it has been truly said that they could not be appointed to, under the power, they not being objects of it, and thus they say a grandchild would be left unprovided for. This, undoubtedly, will be the case if William should, after the death of one child, think fit to exercise the power

(*a*) L. & G. 10.

over the whole estate in favour of his surviving children; but such is the legal result of such an execution of the power. But if William does not think fit to exercise his power at all, or only exercises it in part, then, as the child of William, on one construction, took on his birth a vested interest, subject to be divested by the exercise of the power, a part of that interest will, if the power be not exercised, descend to the grandchild, who will thus be provided for. But it does not appear to me to be any valid argument against one construction to say that, by the result of a legal exercise of a power given by the testator to William, a grandchild who is not a direct object of his bounty may be left without provision.

It has been also objected that if William had an only child, the whole estate in remainder would have vested in him at the moment of his birth; and though he may have died the hour after, yet that all the limitations over would at once be destroyed. That certainly would be the case; but is it as great an evil as will probably result from the other construction? for, by giving an estate tail to William, he is armed with a power, the moment after the testator's death, of defeating by the stroke of a pen the limitations in favour of his issue, and every limitation over.

It has been further urged that if William had an only child, who died in the lifetime of the testator, having several children, none of them could take, according to one construction; whereas if William was held to take an estate tail, they could take under him. I think this objection is applicable in a stronger degree to the construction of an estate tail in William, for if he died in the lifetime of the testator there would be a lapsed devise; and though several children of William survived him and the testator, not one of them would take. This has been since remedied by statute. The true answer to the objection is, that the testator makes his will according to the existing state of his family at the time; and if, after the will is made, any alteration by death or birth should take place, he has the power of providing for it by a new will. And according to the opinion of Chief Justice Tindal, in *Doe* v. *Gallini*, the possibility of a death in the lifetime of the testator does not furnish any legitimate argument for the construction of the will.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

A great reliance has been placed in the argument on the limitations over in default of issue, and it has been urged that this demonstrates a general intent, which, according to several decided cases, must overrule the particular intent. I fully admit that the limitations over in default of issue furnish grounds of argument for the construction in favour of an estate tail; but it cannot be disputed that if there be a clear intention shown in the testator that by the word "issue" he meant "children," then there is abundant authority to show that the words "in default of issue" will be construed to mean "such issue," that is, the "children" of William.

Very many cases have been referred to on both sides; I have analyzed them all, and I have come to the same conclusion that my Brother GREENE has done, that, in not one of them is to be found all the ingredients that exist in this case to show that by the word "issue" the testator meant "children." And it appears to me that the Court is driven to the alternative of either holding that a limitation to "issue," followed by a limitation over "in default of "issue," is so irresistible in its effect as a word of limitation, that no indication of intention shall cut it down to a word of purchase, or the Court must hold that the intention in this case is sufficiently indicated; for I certainly am not able to imagine a case where more concurring circumstances could exist in a will than are to be found in the one now before the Court. The case of *Martin* v. *M'Causland* (*a*) is the one nearest to the present case; and it was there decided by the Court of Common Pleas that an estate tail was created in the first taker. In that case there was an express estate for life given by the will to Robert, with a power of appointment among his issue in such manner as he should think fit, and, in default of appointment, to go among the issue equally, share and share alike; and then there was a devise over in case of the death of Robert without issue. So far as I have stated, that case would be identical with the present. That case, however, wants what is to be found here, and that is, the limitation that in case of there being only one child, that child should take. But this limitation appears to me to be a translation by the testator of the sense in which he

(*a*) 4 Ir. Law Rep. 350.

intended to use the word "issue," and is in effect saying, "If there be but one child, I give to that child; but if there be more than one, I give it to said children equally, share and share alike." And reading the will in this way, as in my opinion it ought, the case of *Foster* v. *Hayes* (*a*), which I believe is the latest on the subject, will be a direct authority to show that William took only an estate for life.

On the whole, my opinion is that the decision of the Court of Common Pleas should be reversed.

JACKSON, J.

The question raised by this special verdict is upon the true construction of the will of Charles Roddy, made on the 21st of September 1817. The testator died on on the 21st of November 1821. The question is, what estate did the testator's son William take in the lands devised to him by that will. Did he take an estate for life only? or did he take an estate in fee-tail in the fee-simple lands, and *quasi* tail in the freehold? The difference of opinion existing amongst the Judges in this Court proves that the construction of this will involves much difficulty.

In the multitude of cases decided in England on wills, raising a similar question, none which I have seen presents precisely the same combination of words to be found in this will; consequently, none of them can be said to be precisely in point with the present; but one of the Irish decisions, to which I shall have occasion to refer, cannot, in my judgment, be distinguished from it. I concurred in the judgment pronounced by the CHIEF JUSTICE OF THE COMMON PLEAS, and having very carefully re-considered that judgment, and also the authorities which have been cited, and the arguments addressed to us upon them in this Court, I have not found sufficient reason to alter the opinion I then formed. That opinion was founded upon what appears to me to have been the settled course of decision in the several Courts of Common Law and Equity in Ireland, and to have been entirely consistent with the previous decisions in the Courts at Westminister; the result of all, as I conceive, being, that

(*a*) 2 El. & Bl. 27; S. C., 4 El. & Bl. 717.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

if the intention of the testator be, that the estate shall not go over until there is a total failure of issue of the first taker, he must take an estate tail.

Before I proceed to examine the words of the will of Charles Roddy, I would observe that I concur with my Brother MOORE, that in construing instruments of this description, I considér it the first duty of the Court to ascertain, if possible, the intention of the testator in framing his will, and, having ascertained it, to carry out that intention, so far as can be done, without violating any established rule of construction; and next, if there be clashing limitations, the Court must depart from some *particular* limitations, in order to give effect to the general intention of the testator. Lord Kenyon observes, in giving judgment in *Denn* v. *Puckey* (*a*), that this was solemnly decided, and anxiously inserted in the certificate in the case of *Robinson* v. *Robinson;* and Ashurst J., in the same case of *Denn* v. *Puckey*, says:—"I believe it rarely happens, when a "man makes his own will, that his whole intention can be effected; "but the lesser evil is, that the intention of the testator should "be defeated in some *particular point*, than that judicial determi-"nations respecting real property should be overturned." And, I may add, it was with this view the several rules of construction, which from time to time have been established, were adopted, beginning with the celebrated rule in *Shelley's case*. I do not mean to carry the doctrine, that the *general intent* must overrule the *particular intent*, beyond the limits prescribed by Lord Denman and the Court of King's Bench, in *Doe* v. *Gallini* (*b*), namely, that technical words must have their legal effect, even though the testator use inconsistent words, unless the inconsistent words are of such a nature as to make it clear he did not mean to use them in their proper sense. But, subject to that qualification, I consider that doctrine to be an established rule of construction. I would likewise refer to the prefatory observations of Lord Redesdale, giving judgment in *Jesson* v. *Wright;* for I think they should be borne in mind when we are called on to decide on wills like Roddy's. His Lordship says:—"There is such a variety of com-

(*a*) 5 T. R. 303. (*b*) 5 Barn. & Ad. 640.

"bination in words, that it has the effect of puzzling those who have "to decide on the construction of wills. It is therefore necessary to "establish rules, and important to uphold them, in order that those "who have to advise may be able to give opinions on titles with "safety." And in the course of his judgment he adds:—"Those "who decide upon such cases ought not to rely on petty distinctions, "which only mislead parties, but look to the words used in the "will."

Let us now consider the words of this will. The question, did testator's son William take an estate for life only, or an estate tail, mainly depends upon this:—in what sense did the testator use the word "issue" in his will? Did he mean to confine it to one class of issue only (viz., children)? or did he mean to include the descendants of his sons to the remotest generations? It is necessary to bear in mind that Charles Roddy had five sons, Bernard, John, William, Thomas and Charles. He first devises a rentcharge of £50 per annum to his wife, and then gives a legacy of £10 to his eldest son Bernard, adding:—"I have heretofore given him much "more in money and value than would be equivalent to a fair pro-"portion of property with my other children." He then proceeds to devise estates to each of his three sons, beginning with John, carefully limiting each set of lands, so as effectually to postpone his eldest son Bernard to the issue of all his three sons to whom he devises the lands.—[His Lordship read the several devises.]—He there varies the language somewhat in each of these devises. In case of John "dying without issue," he devises to William and his lawful issue; and "in failure of issue of William," he devises to John and his issue; and "for want of issue of John," he devises to Thomas and his issue; and "in failure of issue of Thomas," to Bernard in fee; and in the devise of the lands of K. and D. to Thomas, he varies again; and "failing issue of John," then to Bernard in fee.

It seems quite impossible to read this will without arriving at the conclusion that the testator intended to postpone his son Bernard, not only to his other three sons, John, William and Thomas, but to the issue of each and every of them whilst there were to be found

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

descendants of any of them. It is plain he used the words, in case of "my son dying without issue," and "in failure of issue," and "for want of issue," and "failing issue," all in the same sense; and that he intended the same limitations to attach to each set of estates which he had devised to each of his sons, John, William and Thomas; and in each case, after the primary devise of each denomination, the lands are devised to the other sons and their issue, *only* on the failure of issue of the son to whom the testator had devised the previous estate. It is observable how carefully that is reiterated in each instance, thus emphatically declaring what was the paramount general intention of the testator.

Now I think I may assume that the result of the authorities is, that the word "issue," and the words "heirs of the body," are, *prima facie* at least, to be construed in wills as having the same force and effect; and that both forms of expression will include all the descendants of the first taker, to the latest posterity; but I grant that both must yield and receive a restricted construction, if there be circumstances to show that they were so used by the testator. However, this rule is not more applicable to the one form of expression than to the other: *Slater* v. *Dangerfield* (*a*); *Doe* v. *Ruecastle* (*b*). But the plaintiff in error contends the word "issue" in this will must be confined to the first generation, and be deemed a word of purchase, because of the words "and if only one child, then to such only child." I think the predominant intention of the testator, manifestly pervading the whole will, that the descendants of all his three sons should fail before the remainder in fee to Bernard should should take effect, ought to be a sufficient answer to this argument. But the case of *Jesson* v. *Wright* appears to be a distinct authority on the point. There the words were, "I devise "to W. for life, and after his decease to the heirs of his body, in "such shares and proportions as W. by deed or will should appoint; "and, for want of such appointment, to the heirs of the body of "W., share and share alike, as tenants in common; and if but one "child, the whole to such only child; and, for want of such issue, "to the heirs of the testator." It was there held that W. took an

(*a*) 15 M. & W. 263. (*b*) 8 C. B. 176.

estate tail. It appears to me that was a less favourable case for giving that construction than the case now before us, the word "such" occurring there before the word "issue," which may be construed as referring to "such only child." The words "in failure of issue," "for want of issue," and "failing issue," which occur in this will of Roddy, have been almost always construed to mean an indefinite failure of issue, and have been frequently held of themselves to give an estate tail. The plaintiffs in error interpret "issue" to mean "children" only; and then they say the limitation over is in default of children; but I can see no sufficient grounds for restricting the word "issue" and "children" in this will. But it is said that the authority of *Jesson* v. *Wright* does not apply to this case, because the words there were "heirs of the body," and not "issue." No doubt, it has been said that "heirs of the body" has a more technical sense, and "issue" is said to be more flexible; but, it being now well settled that the former mode of expression may be controlled by other words, just as well as the latter form of expression, it follows that both must yield to the paramount intention of the testator. This appears from many cases, to some of which I have already referred, as well as from what fell from the Lord Chancellor in giving judgment in *Jesson* v. *Wright*.

There are several cases where it has been held that the words "child or children," being used with the word "issue," should not cut down the more extended meaning of "issue," as in *Dalzell* v. *Walsh* (*a*) and *Machell* v. *Weeding* (*b*). In this latter case, the testator devised "lands to his son Joseph for life; but if Joseph "should die without issue, not leaving any children, then he "directed the lands to be sold, and the proceeds to be divided "among his three other sons, and if any of them should die before "Joseph, then their share to be divided amongst their children." It was held Joseph took an estate tail. Suppose William Roddy had several children, and survived them all, and that each of them left issue, can it be imagined that the testator intended the estate to go over in that event? Again, suppose William Roddy left one child and several grandchildren by other deceased children,

(*a*) 2 Sim. 319. (*b*) 8 Sim. 4.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

and that William Roddy died without having made any appointment, his only surviving child would, in that case, take the fee; and, according to the construction contended for by the plaintiff in error, if that surviving child should die without issue and intestate, the fee would devolve upon Bernard, to the exclusion of his nephews and nieces, and of his uncles John and Thomas. I cannot think the testator intended the estate should go over to Bernard in that event; and, therefore, I conclude he used the word "issue" not as synonymous with "children," but rather as synonymous with "heirs of the body."

But the main argument on behalf of the plaintiff in error rests upon the passage cited from 2 *Jarman*, p. 371, last ed.; which, as well as *dicta* to be found in some of the cases cited, tend to show that it ought now to be held that William Roddy took an estate for life only, whatever might have been hitherto the course of decisions. The passage from *Jarman* is as follows:—"When words of distribution, together with words which would "carry the fee, are attached to the gift to the issue, the ancestor "takes an estate for life only; and the result is the same, whether "the fee is given by the technical words 'heirs and assigns,' or "by such words as 'estate,' &c., or whether the gift to the issue "be direct or by implication from a power to appoint to them, "and whether there is a gift over on general failure of issue of the "ancestor or not."

No doubt, there are words of distribution in the will of Charles Roddy, coupled with words which would by implication give a fee-simple to the issue of each of the testator's sons, according to decided cases. But I have found no case deciding in terms that such an implication is sufficient to cut down the estate of the first taker from an estate tail to an estate for life. It has been said there is no distinction between an estate in fee-simple, expressly given, and one given by necessary implication; but I think the plain distinction is, that every man must be supposed to understand the effect of the legal technical terms which he employs; and, therefore, the use of such terms is an evidence of his intention. It is very different where the implication is the result of profes-

sional ingenuity, which cannot be supposed to have occurred to the mind of an unlearned testator.

I shall not go through the numerous cases bearing on the question before us; they cannot be reconciled. But the case of *Foster* v. *Hayes* (*a*) was referred to by my Brother GREENE, during the argument. It supports the position of *Jarman*, so far as that when words of distribution are followed by words giving an express estate in fee to the issue, by the technical words "heirs and assigns," the ancestor takes an estate in fee only; and I collect from the concluding passage of the argument delivered by Chief Justice Jervis, that he considered the intention of the testator in that case manifestly was, that the ancestor should take for life only, by reason of the very distinct and technical manner in which he devised the fee to the issue. The Irish cases to which I have already referred, as, in my opinion, settling the law in this country, and which have been cited by Counsel, are, *Crolly* v. *Crolly*, decided in the King's Bench in 1825; *Irwin* v. *Cuffe*, decided in the Exchequer in 1830; *Briscoe* v. *Briscoe*, decided in the Exchequer in ——; *Exors. of Martin* v. *M'Causland*, decided in the Common Pleas in 1841; *Whitsitt* v. *Thompson*, decided in Chancery in 1848; *In re Whitsitt*, decided in the Common Pleas in 1852. And what fell from Sir Edward Sugden, in *Crozier* v. *Crozier*, proves that, in the opinion of that very learned man, if a will shows a clear intention to include all possible issue, and that they could only take through the father, every peculiarity of limitation must give way. He says:—"Life estate, separate gift, reference to issue born, tenancy "in common, power to vary shares, must all give way, and the first "taker must take an estate tail."

In this case it appears to me that we cannot hold the first taker entitled to a life estate only under the will of Charles Roddy, without overruling the continued series of Irish decisions to which I have referred. In *Martin* v. *M'Causland* (*b*), there were words of distribution, coupled with words similar to those in Roddy's will, and sufficient to give an estate in fee by implication to the issue of the first taker. In that case the testator had two sons, Robert and Marcus,

(*a*) 4 Ell. & Bl. 717.

(*b*) 4 Ir. Law Rep. 340.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

and he devised thus:—"I leave to my son Robert, during his life, "all my estate, &c., of and to the lands of C.; and in case my son "Robert shall marry with the consent of his mother, then I devise "the same to any issue he may have by his wife, in such manner "as he shall, by deed or will, direct, limit or appoint, and for "want of appointment to go equally among them, share and share "alike; but in case my son Robert shall die without issue, then it "is my will that the lands of C. shall go to my son Marcus, his "heirs and assigns for ever." It is difficult to state a case more directly bearing on the point before us. The decision was that Robert took an estate tail.

The cases which have been so decided in Ireland constitute the law in this country, and must, as I conceive, continue to govern the Profession, and to guide those upon whom devolves the very responsible duty of advising upon titles, until they shall have been overruled by the House of Lords. It is not enough to say that their authority has been disparaged by the *dicta obiter* of Judges or Chancellors, or that the tendency of opinion in Westminster Hall, evidenced by the writings of eminent lawyers, is contrary to them. I hold we are bound by their decisions whilst they continue unreversed, and that it would shake the titles of many purchasers and incumbrancers who have taken conveyances, being advised that the law was such as is declared in those cases, were we to overrule the judgment of the Common Pleas in this case. I have reason to believe that judgment is in perfect accordance with the settled opinion of the Profession in Ireland. I only mention this to show the danger of unsettling the law—the confusion and litigation which would be thereby created; and I would refer to what fell from Chief Justice Willes, when giving the opinion of the Judges to the House of Lords, in the case of *Parkhurst* v. *Smith* (*a*). He says:—"If, therefore, "I could not make this consistent with the rules of law, I should "rather choose to put a construction on these words contrary to "the rules of law, than to overturn many thousand settlements." This is, indeed, very strong language, and equally strong is what fell from Lord Brougham when pronouncing judgment in the Lords, in *Phipps* v. *Ackers* (*b*). In the case of *Doe* v. *Moore*,

(*a*) Willes, 339. (*b*) 9 Cl. & Fin. 599.

it had been held that John Moore took a vested, and not a contingent, interest; and Lord Brougham stated he was now of opinion that was an erroneous decision; and that if it were not *res integra*, it would now be decided he took a contingent, and not a vested, interest. "But," he says, "the principle sanctioned "in *Doe* v. *Moore* having been for so many years adopted by "acquiescence, no course ought now to be taken which should "break in upon it. It is of the most essential consequence that "the doctrines which have been received for law, and acted upon "by the Courts in their decisions, and by the parties and their "professional advisers in the disposition of property, should not "be shaken. The Courts, and even this House, have frequently "proceeded upon this principle, and have sanctioned what even "plainly appeared to be erroneous principles introduced and long "assumed as law, rather than occasion the great inconvenience "which must arise from correcting the common error, and recur-"ring to more accurate views."

Upon the whole, then, I think the intention of the testator Roddy, in this will, perfectly clear; and that, in order to effectuate that intention, it is necessary to hold that each of the sons, John, William and Thomas, took estates tail, and *quasi* in tail, in the several lands devised to them respectively; that no established rule of construction is violated, or technical terms disregarded by so deciding; but, on the contrary, that we are bound by the course of decision in Ireland so to construe the will; and finally, that, even though we should be of opinion that if this question were *res integra*, the decision ought to be different, still we are not at liberty to act upon that opinion, and thereby to unsettle the law, to shake titles, and overturn numerous dispositions of property, which have been taken upon the faith of so long a course of judicial decisions in Ireland. The consequence is that, in my opinion, the judgment of the Common Pleas should be affirmed.

BALL, J.

The several devises contained in this will to the testator's three sons, John, William and Thomas, being, for the purpose of the ques-

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

tion we are now considering, substantially the same, I will take the one which first occurs—the devise to John; it runs in substance thus:—"I devise the lands to John, and, after his decease, I devise "the same to his lawful issue, in such manner, shares and propor-"tions as he may direct; and in default of his appointment, then "to his issue equally, share and share alike; and if only one child, "to such only child; and in case of John dying without issue, "then to William and his issue, with like power of appointment, "and in like manner in all respects as before provided with respect "to John; and in case of William dying without issue, then to "Thomas and his issue, in like manner as aforesaid; and in case "of his death without issue, then to Bernard (the testator's eldest "son), in fee.

It is not disputed that, upon a devise to a parent for life, and after his decease to his issue, with power to him to appoint the estate among his issue in such shares as he shall think fit, the issue, in default of appointment by him, take the estate in equal shares. Again, it has been shown in the course of the argument at the Bar, and is not now questioned, that the effect of devising lands to a parent for life, with remainder to his issue, in such manner, shares and proportions as he may direct, is to empower him to appoint the fee to the issue; and the effect of a devise to the issue, share and share alike, in default of such appointment, is to give them an estate not less than that which might have been appointed to them in exercise of the power, that is to say, an estate in fee. To apply these doctrines to the will now before the Court: we have here a devise to the testator's son John, for life, and after his decease to his issue, in such manner, shares and proportions as he should direct; whereby he was empowered to appoint the fee-simple to or amongst them as he should think fit; and we have then a devise to the issue in default of such appointment, equally, share and share alike, whereby they would have been entitled co-existingly, and not in succession, to the fee which John could have appointed to them in the exercise of his power. This being so, the question is, what estate did John and his issue take under this will? Was it an estate tail, as ruled

by the Court of Common Pleas, which we have now under consideration, or was it an estate for life only, with remainder to his issue in fee-simple, as insisted on behalf of the plaintiff in error? In other terms, is "issue" in this will to be construed as a word of purchase or of limitation? In my opinion, it should be construed as a word of purchase.

I concurred in the judgment of the Common Pleas upon the construction of this will, when pronounced; but after the very full discussion which the case has since undergone, on two several occasions at the Bar of this Court, when one or more authorities of great weight were cited for the first time, I have, upon further consideration, arrived at the conclusion that the judgment of the Common Pleas should be reversed. To say nothing of *Hockley* v. *Mawbey* and the earlier authorities, a series of modern cases cited in the argument at the Bar, including *Lees* v. *Mosley*, *Greenwood* v. *Rothwell*, *Slater* v. *Dangerfield*, *Crozier* v. *Crozier*, *Montgomery* v. *Montgomery*, and lastly, *Kavanagh* v. *Morland* (each of them bearing more or less upon the question raised in this case), appear to have established or recognised the doctrine that, under such a devise as we are now considering, that is to say, to the parent for life, and after his decease to his issue, with such power annexed as would enable the parent to appoint the fee-simple among the issue, and such further limitations as would give them the fee in equal shares in default of appointment, the parent takes an estate for life only, with remainder to his issue in fee. The principle of the decisions in those cases is stated to have been that, where the issue can take the fee-simple under a prior devise in the will, there is no necessity for doing violence to the language of the testator by enlarging the estate for life, given in express terms to the first devisee, into an estate tail, in order to give an estate of inheritance to the issue. In *Lees* v. *Mosley*, the first of the foregoing series of cases, there was a devise to W. for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions as he should appoint; but in case W. should not marry and have issue who should attain the age of twenty-one years, then to O. in

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

fee. In that case it was held by the Court of Exchequer in England, that "issue" was to be construed as a word of purchase; and that, accordingly, W. took an estate for life only, with remainder to his issue in fee. Now, in the case before us, as in *Lees* v. *Mosley*, the issue would, upon the admitted principles to which I have adverted, take the fee-simple of the estate in default of appointment, in equal shares co-existingly, and not consecutively, as issue in tail, and this by virtue of the first clauses in both wills, apart from the question as to the effect of the devise over in default of issue. So far the case of *Lees* v. *Mosley* and the present case correspond in their circumstances; but, besides, there is found in this case a circumstance aiding the construction which did not occur in *Lees* v. *Mosley*, but which is relied on by Sir Edward Sugden, in *Ryan* v. *Cowley*, and has been held material in other cases, viz., that the testator has here put his own construction on the term "issue," by employing it as synonymous with "child." Then as to the case of *Lees* v. *Mosley*, considered as an authority, we find Baron Parke, in delivering the judgment of the Court of Exchequer, in *Slater* v. *Dangerfield*, acted upon the principle of that decision, and stated that it had been made by the Court upon great deliberation; and Sir Edward Sugden, in giving judgment in *Crozier* v. *Crozier*, recognises the authority of *Lees* v. *Mosley*; and in *Montgomery* v. *Montgomery*, he adopts the principle of that case, and states it to have been conformable to the decisions in former cases. The case of *Greenwood* v. *Rothwell* was a devise to J. G. for life, and after his decease to all and every the issue of his body, share and share alike, as tenants in common, and the heirs of such issue; and it was held by Lord Langdale, acting on the certificate of the Court of Common Pleas, that J. G. took an estate for life only, and not an estate tail. The authority of that case is strongly relied on by Baron Parke, in his judgment, in the case of *Slater* v. *Dangerfield*. In *Slater* v. *Dangerfield*, the devise was to G. for life, and from and after his decease to all and every his lawful issue, and their heirs, equally, as tenants in common, and not as joint tenants, on attaining the age of twenty-one years; and it was there held, in conformity with *Lees* v. *Mosley* and *Greenwood* v. *Roth-*

*well*, that G. took an estate for life only, with remainder to his issue, as purchasers in fee. Then comes the case of *Crozier* v. *Crozier*, which was a devise of freehold interests held under leases for lives, to J. C. for his life, remainder to his issue male and female by his then wife, to be divided amongst them in such manner, shares and proportions as J. C. should appoint, and, subject to the payment of the rents of the lands, to an annuity of £40 during the continuance of the leases. Sir Edward Sugden there held that the effect of the power of appointment "in such manner," &c., and the charge of the annuity, was to give the issue by implication the absolute interest in the leaseholds—equivalent to the fee-simple in estates of inheritance—and that accordingly J. C. took an estate for life only therein; but he stated that if there had been nothing in the will to carry the whole interest to the issue, he considered that J. C. would have taken an estate tail, in order to effect that object. Here is a distinct intimation of the principle upon which that case was decided, viz., that J. C. would have taken an estate tail if the issue could not have taken the fee; but it appearing that they could have done so, the estate of J. C. was held to be for life only. In that case of *Crozier* v. *Crozier*, Sir E. Sugden, in his judgment, enumerates several matters which had aided his conclusion that, by the devise to the issue male and female of J. C., the testator had intended the first line of issue only, that is, "children." He observes that in that case there was not simply a devise to J. C. and his issue, but an express estate for life was given to J. C. himself, and there was a separate gift after his decease to his issue—the formal words, "I give and devise the same to his issue," being repeated—which, as Sir E. Sugden observed, looked like a new gift. Then he notices the words of distribution annexed to the gift to the issue—"to be divided amongst them in such manner, shares and proportions as he shall appoint;" importing that the issue were to take among themselves as tenants in common, and not in succession, as issue in tail: and further, he states that, under the power of appointment in such "manner" as J. C. should direct, the whole interest might have been ap-

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

pointed, and, in default of appointment, the issue might have the whole.

Now, every one of the foregoing circumstances pointed out by Sir E. Sugden, as importing that the issue in the case of *Crozier* v. *Crozier* were intended to take as purchasers, is to be found in the will in this case. We have here, as in *Crozier* v. *Crozier*, not simply a devise to John and his issue, but an express estate for life given to John himself, and a separate gift after his decease to his issue—the formal words of devise to them being omitted, as in *Crozier* v. *Crozier*. Again, we have here the same words of distinction annexed to the gift to the issue as in that case; and, finally, we have the same power of appointment among the issue, as in *Crozier* v. *Crozier*, in such manner, share and proportions as John should direct. To this may be added, that we have in this will, in aid of the construction (as I before noticed) what was not to be found in *Crozier* v. *Crozier*, namely, the employment by the testator of the word "child," as synonymous with "issue." In *Montgomery* v. *Montgomery*, Sir E. Sugden again acted on the principle of construction upon which he had decided *Crozier* v. *Crozier*. In that case the testator devised "part" of certain lands to his son during his life, and in case his son should survive his then present wife and marry again, and from and after his decease he devised the same to his son's issue by such second or other marriage, share and share alike, and in default of such issue, he devised the same over in fee. The words of the devise, "my part" of the lands, were sufficient to carry the fee to the issue, without superadded words of inheritance; and Sir E. Sugden held that the son took an estate for life only, with remainder to his issue by a second marriage, as tenants in common in fee. Here then we have a further recognition of the principle of *Lees* v. *Mosley*, *Greenwood* v. *Rothwell*, *Slater* v. *Dangerfield*, and *Crozier* v. *Crozier*.

As to the three first of those cases, it has been insisted at the Bar that they are distinguishable from the present, in this respect, that in all of them there were words of inheritance annexed to the gift to the issue, which indicated expressly the testator's intention

to give the issue the fee-simple; whereas in the present case there are no such accompanying words: but as to this objection, the answer appears to be that, provided it can be shown that the testator intended that the issue might take the fee, it was immaterial by what form of words he manifested such intention—whether by annexing words of inheritance to the gift, as in the three first of the foregoing cases, or by empowering the first devisee to appoint the estate among the issue in such manner as he should direct, as in *Crozier* v. *Crozier* and the present case, or by devising his "part" of certain lands to the issue, as in *Montgomery* v. *Montgomery*, or by any other form of words, which, by legal intendment, would give the fee to the issue; and accordingly, Sir E. Sugden held in *Crozier* v. *Crozier* that, as well the power to appoint the estate in such manner as C. J. should direct, as likewise the charge of the annuity upon the persons who were from time to time to take the lands, had the effect of a devise of the *quasi* fee to the issue, without words of inheritance; and in *Montgomery* v. *Montgomery*, the same learned Judge held that the testator's description of the lands devised as "my part" of the lands, had the same effect.

It has been insisted, however, that the foregoing decisions are all distinguishable from the present case, for this reason, that in none of them was there, as there is here, a devise over after an indefinite failure of issue of the first devisee; but I apprehend it to be settled by the authorities that the question as to the construction of the devise to John and his issue in this case is not affected by that circumstance. The rule on the subject, as deduced from the authorities, is stated thus by Vice-Chancellor Page Wood, in *Kavanagh* v. *Morland*. He says:—"If there be a gift to the issue, and a "limitation in the will with reference to them, which has the effect "of giving them the fee-simple, then, if there be a gift over in case "of dying without issue, the gift over affords no evidence of in-"tention to justify the application of the rule in *Shelley's case*, be-"cause the fee was in the issue, and the words 'dying without issue' "are consequently held to mean only such issue as were before "mentioned;" and for that doctrine he cites *Hockley* v. *Mawbey*

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

and *Leeming* v. *Sherrat.* The Vice-Chancellor proceeds:—"But "if the fee be not in the issue as purchasers, and words occur "importing a gift over in fee, after an indefinite failure of issue, "then the words giving over the property in that event have been "held to be so strongly indicative of the testator's intention that "the estate should not pass over except upon failure of all the issue, "that those words are made to reflect back upon the preceding "limitations to the issue, if those limitations do not clearly affect "the intention of the testator, of not giving over the property until "the issue fail—as, for instance, if for want of superadded words of "limitation they would take, as purchasers, life estates only, the "Court in that case is obliged to construe the word 'issue,' in the "original gift, as a word of limitation, for the purpose of carrying "into effect the general intention implied from the gift over." In conformity with the foregoing doctrine, the Vice-Chancellor ruled, in the case before him, that the first devisee (to whom an express estate for life had been limited, with remainder to his issue, share and share alike, and in default of issue remainder over) took an estate tail under the will; stating as the ground of his decision, that there being a gift over on an indefinite failure of issue, and the gift to the issue in the first instance being too weak in itself to confer on them more than an estate for life, the rule in *Shelley's case* must be applied, and the first devisee must be held to take an estate tail.

However, it has been suggested, in the argument at the Bar, that Sir E. Sugden, in his judgment in *Crozier* v. *Crozier*, has employed language importing that the effect of a devise over, after an indefinite failure of issue, is to give an estate tail to the first devisee, even where, as in that case, the fee-simple was in the issue; inasmuch as he says that some passages in the will, which he had pointed out as evidencing the testator's intention that the issue were to take as purchasers, should all give way, and the testator's son John should be held to take a *quasi* estate tail, if the will had shown a clear intention to include all possible issue, and if they would take only under the father. Now, it appears to me that the language of Sir E. Sugden was not intended to convey, and did not import, the meaning so imputed to it; for it will be observed that the circum-

stance of the fee being in the issue is not enumerated by Sir E. Sugden in the judgment referred to, among those matters which should give way to a clear intention on the part of a testator to include all possible issue. It appears in the report of the case that, at the close of the argument, upon the hearing of the cause, Sir E. Sugden expressed his opinion that the fee-simple was in the issue, and that being so, that the issue took as purchasers; but he postponed delivering judgment until he should have given further consideration to the case; and, on a subsequent day, he proceeded to pronounce judgment, and pointed out certain provisions in the will, importing, as he considered, the testator's intention that the issue should take as purchasers—that is to say, a life estate expressly given to his son John, a separate gift to his issue, a reference to issue then born, a tenancy in common among the issue, and a power to John to vary the shares; but he added that all the matters so enumerated, and which he then repeated, should give way, and John should be held to take an estate tail if the will had shown a clear intention to include all possible issue, and if they could have taken only under the father. Now it will be observed that, among the matters so pointed out by Sir E. Sugden, the circumstance of the fee being in the issue was not included, and accordingly it cannot be said to have been one of those which he stated should give way in the event above mentioned.

It has been contended, in the course of the argument, that the judgment of the House of Lords, in *Jesson* v. *Wright*, rules the present case; and it has been relied on that the only distinction between them is, that in *Jesson* v. *Wright* the words were "heirs of the body," whereas here they are "issue." Supposing the fact to be so, even that distinction might afford a sufficient ground for holding that *Jesson* v. *Wright* does not rule this case; but the material distinction between the two cases is, that in *Jesson* v. *Wright* there were no words, as there are here, to give the fee-simple to the issue; neither were there words of inheritance annexed to the gift to the issue, nor were the words "my estate," or "my part" of the lands, or other words descriptive of the testator's entire interest therein, employed, nor was the first devisee

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

empowered, as here, to appoint to the issue the fee-simple of the lands; but the issue could have taken estates for life only: it follows that the principle of construction which governs this case could not have been applied in *Jesson* v. *Wright.*

But it has been contended at the Bar that the decisions in Ireland have been counter to the principle of construction which appears to me to rule this case, and five Irish cases have been cited to sustain this position:—first, *Croly* v. *Croly;* secondly, *Briscoe* v. *Briscoe*; thirdly, *Irwin* v. *Cuffe;* fourthly, *Whitsitt* v. *Thompson;* fifthly, *Martin* v. *M'Causland.* As to the three first of the foregoing cases, one general observation occurs, viz., that in none of them could the issue have taken the fee-simple, and therefore they are not applicable as decisions to the present case. With respect to the first of them *(Croly* v. *Croly)*, it seemed to have been assumed in the argument that the issue could have taken the fee-simple by virtue of the word "estate;" but that is not so. On reference to the report, it will be found that the testator devised his "estate" in the lands of Cahirgal to trustees and their heirs, to the use of his second son Richard Croly for life, and, from and after his decease, to the use of his issue, in such proportions as he should direct; but in case his second son Richard should die without issue, he devised the aforesaid "lands" (not "estate") of Cahirgal to his trustees, to the use of his eldest son John Croly for life, and, after his decease, to the use of his issue, in like manner and with like power to devise the same to his issue as in the case of his second son Richard. Richard, the second son, survived the testator, and died without issue, and John, the eldest son, afterwards died, leaving issue the defendant Richard; and the question raised was, what estate did the defendant Richard take under his grandfather's will? The Court of Queen's Bench certified that he took an estate tail. Now it will be observed that the devise under which the defendant Richard (the son of John) claimed was a devise of the "lands" to the issue of John, and not of the testator's "estate" in the lands, as in the case of the devise to the issue of Richard, the testator's second son; and as the will was made before the Wills Act of 1837, the description

"lands" could not have carried the fee to the issue of John, for want of words of inheritance; accordingly, the Counsel who argued in that case in favour of the estate tail relied on the circumstance that the defendant Richard, as issue of John, could not take the fee under the will, and it was in a case so circumstanced that the Court held that the defendant Richard took an estate tail. Accordingly, *Croly* v. *Croly*, being distinguishable from the present case in the foregoing particular, is not an authority bearing upon it. As to *Briscoe* v. *Briscoe*, there were neither words of inheritance annexed to the gift to the issue, nor was there a power of appointment enabling the first devisee to appoint to the issue in fee, nor were there any words in the will under which the issue could have taken the fee. As to *Irwin* v. *Cuffe*, the same observations occur; for the report of the case, purporting to give not the words of the will, but only a loose statement of its contents, describes the power of appointment as "in such manner," &c. Yet when the Counsel who argued against the estate tail came to state the power, they described it as a power to appoint the proportions or the objects of the gift, and not as a power to appoint the quantity of interest to be taken by them, either by the employment of the words "manner," &c., or otherwise. Accordingly, it was not suggested in that case, either at the Bar or by the Court, that anything turned upon the point as to whether the issue could take the fee or not; still less was it relied on that, upon the true construction of the will, they could have taken the fee. Then comes the case of *Whitsitt* v. *Thompson*, which, as I read the judgment of the Lord Chancellor, was not a decision upon the point we are now considering. In that case the Chancellor abstained, as I understand him, from pronouncing any opinion upon the authority of the Irish cases, leaving it an open question, so far as his judgment went, whether they could be reconciled with the English decisions; but on the supposition that all the three Courts of Law in Ireland had decided in favour of the estate tail, he deemed it right to follow the principle of that decision, and not to overrule it; leaving it open at the same time to the party against whom he pronounced judgment, to take a case again to a

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

Court of Law in Ireland, if so advised—an intimation, I may observe, that he did not consider the law as settled by the Irish authorities. Finally, there is the case of ***Martin*** v. ***M'Causland***, with respect to which, as I had concurred in the decision when it was pronounced, I will only say that, for the reasons I have expressed, I cannot abide by that case as an authority. I will observe, however, that, with the exception of ***Lees*** v. ***Mosley***, not one of the six cases to which I have referred as establishing or recognising the principle which rules the present case was cited; and even ***Lees*** v. ***Mosley*** appears to have been relied on for a different purpose. Indeed, I do not know that any of those six cases, with the exception of ***Lees*** v. ***Mosley***, had been decided, or at least reported, when the case of ***Martin*** v. ***M'Causland*** was argued in the Common Pleas.

For these reasons, I am of opinion that the judgment of the Court below ought to be reversed.

PERRIN, J.

I do not think it necessary to consume the time of the Court, and shall merely add two observations, which were not adverted to by my Brethren who have taken a different view of this case; first, the decided intention of the testator that his other sons, particularly his eldest, should not take until there was a failure of issue of the others. There are a variety of expressions in the will clearly establishing an intention on the part of the testator that the property was not to part from William Roddy until his issue had been exhausted, coupled with a declaration that he had provided for his eldest son; secondly, by giving an estate tail to William, he thereby gave him power to defeat the remainders given to the others. I therefore concur in opinion with my Brother JACKSON, that the judgment of the Court below ought to be affirmed.

TORRENS, J.

I concur in thinking that the judgment ought to be affirmed. The limitation in this will is to the "issue;" that word issue must be read as synonymous with "heirs of the body;" and, until there

be an indefinite failure of such issue, the estate over is not to take effect. That rule was clearly established in *Robinson* v. *Robinson*, and we are not now to inquire whether it was a wise and salutary rule or not. In the case of *Slater* v. *Dangerfield*, which was so much relied on, the judgment was founded on the words of inheritance being superadded, thereby making the heirs the depositors of testator's intention; and further, in that case there was no limitation over; there is therefore no reason for saying our present decision will overrule that case. I have not been able to find any case overruling the decisions in this country. No doubt, there are *dicta* of Judges condemning the rule as laid down in *Robinson* v. *Robinson*, and intimating that a new rule ought to be adopted; but there is no authority to be found overruling any of those decisions. The course of authority in this country having been thus undisturbed, we are now called on, at this distance of time, to overthrow that settled course of construction under which titles have passed and been established, and thus open a door to endless litigation. I, for one, am not prepared to go that length; I am not prepared to say that this Court ought to correct the law. If the House of Lords thinks fit to say that a new rule ought to be adopted, we cannot dispute that supreme jurisdiction; but, until those authorities be reversed, I shall abide by them.

PENNEFATHER, B.

This case comes before the Court upon a writ of error on a judgment delivered by the Court of Common Pleas; and the question is as to the estate which William Roddy took under the will of Charles Roddy, made in 1817. The Court of Common Pleas held that he took an estate tail. It has been argued before us that this judgment was wrong, and that, under this will, William Roddy took only an estate for life; and we are now to decide which construction ought to be adopted. The facts of the case are fully before the Court; my Brother GREENE has opened them at length; and my Brothers MOORE and BALL, who gave their opinion in concurrence with his, have, in fact, almost exhausted the subject. Concurring as I do with them, very little remains for me to say, and any observations

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

I shall make are not so much for the purpose of further elucidating the subject, as in deference to the opinions of those who differ from me.

It is said that the plain intention of the testator was to give an estate tail to William Roddy. I confess I am at a loss to discover that plain intention, much less any intention to give the first taker an estate tail. This question then involves the rule in *Shelley's case*, followed (as I presume it was followed) by the decision in *Robinson* v. *Robinson*, the propriety of which I do not now canvass, because, for the reasons I shall state, I think the case before the Court is already distinguishable not only from the case of *Robinson* v. *Robinson*, but from other cases which have been decided the same way. The rule in *Shelley's case* was laid down nearly three hundred years ago; and although that rule may have frustrated rather than forwarded the testator's intention, yet it must be followed, and now taken to be the law. But although that case fixes a certain meaning as applicable to the expression "issue," yet the testator may modify that technical expression; he may say, "heirs of the body" means "sons;" but if the term be unexplained, I admit its meaning cannot be controverted. Here then is a devise of these lands to William Roddy for life, and then to his issue, with a power to William to appoint the lands among his children in such shares and proportions and form as he shall think fit; and, if only one child, to that child, and, in default, over.

It may be admitted that it was the intention of the testator, while any issue of his second son remained, the estate should not go over; but has he so expressed that intention? When he limits an estate for life to William, he, at the same time, gives him power to appoint to any of his children in fee, so as to enable the appointee to defeat the other objects of his bounty. Now, no case is to be found in the books where words of a similar kind have been held to confer an estate tail. The origin and meaning of the rule in *Shelley's case* is this—we overrule and control that intention of giving the first taker an estate for life, because no words of limitation were superadded; for if "issue" be considered as a word of purchase, it will not carry the fee; but when the intention was express that there

should be a life estate, the necessity for adopting the rule in *Shelley's case* does not exist. Here we have an estate for life given to the first taker, followed by a limitation to his issue; then follows a power of distribution in shares among his children, both males and females, with a power of limiting the fee to the children, thus rendering it unnecessary to control the first words, by making the word "issue" a word of limitation.

But it may be argued that, inasmuch as the words do not in express terms convey an estate in fee, and if giving that power to the father constitutes a fee in the children, that this case has not been solved by any decided case. I am now supposing and arguing the case as if there was no power of appointment; and I cannot see any difference that creates, because the object of the rule and the reason of its adoption was that children should not be excluded. If they took the fee by construction, it would appear the same thing as if they took by express words; the object and result would be the same. Therefore, it would appear to me, independent of the words which occur in this will, "if only one child, then that child shall take the whole"—independent, I say, of that expression, it appears to me (subject to the doubts which others entertain) that the other portions of the will show very distinctly that the issue of the children were to take, and consequently there is no necessity for introducing the rule in *Shelley's case*. In *Doe and Jesson* v. *Wright*, the words were "heirs of the body;" but there were no words of limitation grafted on these words. The power was to appoint "in such shares and proportions," and not "in manner and form;" and it was held that these words did not regulate the quantity of the estate. I cannot acquiesce in this, that because there had been a mistake, we are to give way to that mistake, and, because there would be a hardship, we are to give way; but we are to give judgment according to law, regardless of what may be the operation of our decision.

In my opinion, the judgment ought to be reversed.

PIGOT, C. B.

I have come to the conclusion that this judgment ought to be

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

affirmed. The view I take is similar to that stated by my Brother JACKSON, at the close of his judgment. It appears to me that there has been a settled course of decision warranting the judgment of the Court of Common Pleas. The case of *Croly* v. *Croly* is distinguishable from the present, in the circumstance that there was nothing there necessarily carrying an estate in fee. *Montgomery* v. *Montgomery* is a distinct authority for holding that, in such a will as the present, a devise over may have the effect of giving to the term "issue" the same meaning as "heirs of the body," and therefore holding that the rule in *Shelley's case* must apply. It appears to me that that rule has not been controverted by any decided authority. In this case, there was a devise expressly for life, and a power of appointment in fee. I put aside the expression "child," for that is equivocal. The main point upon which this case must be decided is that indicated by the power of appointment in fee, and the alternative distributive devise over, in default of appointment. *Lees* v. *Mosley* does not controvert this decision; in that case, there was no devise over. In *Slater* v. *Dangerfield*, there was a devise over, but only of the residue, which did not affect the construction of the preceding words. I would say, if this were a devise to the first taker for life, with remainder to his issue as tenants in common, and, in default of that issue, remainder in fee, the rule in *Shelley's case* would then apply. There is no decision controverting *Robinson* v. *Robinson*. Finding, therefore, the authorities indicating the law governed by the decisions establishing the judgment in this case, I must hold it to be correct. We ought not therefore to unsettle established decisions, and expose suitors to the danger arising from unsettled titles.

MONAHAN, C. J.

Having delivered the opinion of the Court of Common Pleas in this case, and stated at some length the reasons which influenced the Members of that Court to come to the conclusion we then did, and having, on the present occasion, re-considered this case, and the authorities to which we have been referred, I continue of the same opinion as that I formed in the Court below.

The question is, what estates did John, William and Thomas Roddy, the three younger sons of the testator Charles Roddy, and their respective issue, take in the lands respectively devised to them by the will of their father Charles Roddy? as, though there are some slight differences of expression in the words used in the several devises to the different sons and their issue, I do not think there can be any doubt that the testator had the same intention as to the mode of devolution of the three separate properties devised to each of said sons, merely changing the order of succession as between them. It occurs to me that the true meaning of the rule in *Shelley's case* is, not that the words "heirs of the body," or any other words, are to have any particular inflexible meaning, but that, when an estate is limited expressly for life, or in general terms, not specifying the quality of estate, by will, to a party, and, after his estate, to his descendants, by such words that testator's intention can be ascertained to be that the estate is to pass to all his descendants, and remain with them so long as they shall continue in existence; but that, at whatever period all such descendants shall cease to exist, the estate shall pass to another; but in such case the rule in *Shelley's case* applies, and the first taker is held to take an estate tail; and that the use of the words "heirs of the body," or any such, are only material for the purpose of ascertaining the intention of the testator as to the intended objects of his devise—and this, though the testator intended that the first taker should have a life estate only, it being, in most of the cases, tolerably clear that the testator intended what he expressed, as in *Jesson* v. *Wright*, that the first devisee should have a life estate, and no more; yet, though such was the intention, with respect to the devise to the first taker, it was held that that intention could not be effected; because, from the entire will, it appeared to be the testator's intention that the issue of such first taker should take so long as they continued, and, on their failure, that the estate was to go over. This appears to me to be the true rule as established by the House of Lords in that case. The words of the devise in that case are very similar to those in the present; so similar that, I confess, I see no substantial difference, save that the words in that case are "heirs of the body," and in this

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

case "issue." I, for one, regret very much that Judges have been from time to time endeavouring to make a distinction between the words "heirs of the body" and "issue"; in some cases, *Lees* v. *Mosley*, for instance, stating that the word "issue" was a word of no definite legal meaning, but one that might, according to the context, be construed either as a word of purchase or limitation, as would best effect the apparent object of the testator. I think more litigation and uncertainty has been caused by this attempt at making a distinction between "issue" and "heirs of the body," both evidently meaning the same thing, than by any other rule of recent construction; but be this as it may, all the more recent cases, *Slater* v. *Dangerfield* and *Doe* v. *Rucastle* (*a*), for instance, lay down the rule as to the meaning of the word "issue." Thus, the word "issue" in a will *prima facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation; but this *prima facie* construction will give way if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class, or at a particular time. If this is the rule to be applied to the present case, I cannot find anything in the will before me to show that the testator in the present case used the word "issue" in any sense different from what the testator, in the case of *Jesson* v. *Wright*, used the words "heirs of the body." The words in that case were, "to W. for life, and, after his decease, to the heirs "of his body, in such shares and proportions as the said W. shall by "deed or will appoint; and, for want of such appointment, to the "heirs of the body of the said W., share and share alike, as tenants "in common; and, if but one child, the whole to such only child, "and, for want of such issue, to the heirs" of the devisor. In the present case, the devise of one of the denominations of land is to W. during his life, and, after his death, to his lawful issue, in such manner, shares and proportions as he shall by deed or will appoint, and, for want of such appointment, to his issue equally, if more than one, and, if only one child, to said child; "and on failure of issue of my "son William, I devise said lands to my son John and his issue, "with like powers of appointment, &c.; and, for want of issue of

(*a*) 8 C. B. 876.

"my said son John, I devise said lands to my son Thomas and "his issue, as in the former limitation; and, on failure of issue "of my son Thomas, I give and devise said lands to my son "Bernard, his heirs and assigns." The only difference between the words of the devise to William Roddy and his issue, and the devise in the case of *Jesson* v. *Wright*, is, that in one case the express tenant for life has power to distribute the estate among the issue in such shares and proportions as he shall think fit; while, in the other case, he is empowered to devise it to the issue in such manner, shares and proportions as he shall think fit, the only difference being the introduction of the word "manner." Now, that the testator would have used the word "issue" in the present will in a different sense from that in which he would be held to have used it if he had omitted the word "manner," is far too refined for my comprehension; but the argument is by reason of the introduction of the word "manner." The devisor for life had powers to devise an estate in fee-simple to the object of the power, and therefore, in default of the execution of the powers, the object of the powers will take the same estate, that is, an estate in fee-simple; and therefore we hold that the objects of the powers are not issue generally, but children. This, I confess, is a train of reasoning I cannot follow. If, for instance, in *Jesson* v. *Wright*, the devisee for life had powers to limit even life estates among not merely children, but also the remoter issue of his body, I do not see why, in the present case, though William Roddy had powers to limit life estates in fee-simple, that power should be confined to his children, and that he could not include his grandchildren as objects of his power; and if he could, I do not see why, in consequence of the existence of such powers, the word "issue" should, in the present case, be held to mean not descendants generally, but children. The argument advanced in support of such a construction, as I understand it, is this: if the words of the devise are only sufficient to confer life estates on the issue, we must take it as used in its general sense or word of limitation, embracing all issue; as otherwise the devise would determine on the failure of the first class of issue, namely,

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

the children; but if we can give estates in fee-simple to the children, it will be difficult, as the issue of such children may take as their heirs. This, no doubt, is true; but those who adopt this construction, in my opinion, are satisfied with giving effect only to a portion of the will, overlooking another considerable portion of the same instrument. In this case, is it not necessary for the Court to consider what the intention of the testator was in using the words, "and, on failure of issue of my son William, I give and devise said last mentioned lands to my son John and his issue?" and also the words, "and, for want of issue of my said son John, I give and devise said lands to my son Thomas and his issue?" and also the words, "and, on failure of issue of my said son Thomas, I give and devise said lands to my son Bernard, his heirs and assigns?" And if it be necessary for the Court to give any construction to these words, are not they the words which have always been considered to denote an indefinite failure of issue, and therefore to create an estate tail? What right has the Court altogether to disregard the intention of the testator, that, on the failure of the issue of William, the property should go, not to his (the testator's) eldest son Bernard, but to his third and fourth sons, John and Thomas, successively?

I am quite aware of that class of cases which establishes that if there are clear and distinct limitations to a limited class of issue, a limitation over in default of issue will be intended to have been used as in default of such particular class, and not to imply a general failure of issue more extensive than those included in the prior limitations; but that rule appears to me to be necessarily confined to those cases in which the power limitations are clearly confined to a limited class of issue, and that they have no application to a case like the present, when the power of limitation is to issue generally, and that we are bound to consider the entire will in the present case, and if we can satisfy ourselves in what sense the word "issue" was used in any particular clause, that it is a much more rational mode of construction to assume that the word was used in the same sense in the clauses which are somewhat ambiguous than, first, to put a final construction on the am-

biguous clauses, and then cut down the clear clauses by a similar construction; in other words, that if, from the general context of this will, we come to the conclusion that the intention of the testator was, that there should be a general failure of the issue of the three younger sons before the property should pass to Bernard, and that, on the failure of issue of one of the younger sons, the property should pass to the other in preference to the eldest son Bernard, that we are bound to give effect to that intention by giving estates tail to the younger sons in succession, rather than give an estate in fee-simple to the child of the second son, and in that way give Bernard, as heir of such child, precedence and priority over the two younger sons and their issue. These are the reasons which, unless the case is concluded by authority, induce me to hold that the present case comes within the principle and reason of the decision of the House of Lords in the case of *Jesson* v. *Wright*.

In answer to this, it is asserted that it is now established by authority, that where there is a devise to A for life, with remainder to his issue in equal shares and proportions, in words sufficient to give an estate in fee to the issue, the first taker will take for life only, and that the issue will take in fee-simple; whether the powers to take in fee-simple are confined to children or to remoter issue living at the death of the first taker, I do not clearly collect from the argument. For instance, if in the present case the son William died, leaving children and grandchildren, I do not know whether the argument is that the children should take, excluding grandchildren, or, if there were grandchildren of a deceased child, whether they should take *per stirpes* or *per capita*. The case of *Lees* v. *Mosley* (*a*) has been referred to as establishing this doctrine. In that case the devise was to H. J. for life, with remainder to his issue and their respective heirs, in such shares and proportions as the said H. J. shall appoint; but in case the said H. J. shall not marry and have issue who shall attain the age of twenty-one, then to testator's son O. in fee. In that case there was no express or necessarily implied intention that the testator's son Oswald should take the estate on a general or indefinite failure

(*a*) 1 Y. & C., E. C., 589.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

of issue of the previous taker, Henry James; the devise was in the event of Henry James having no issue who should attain twenty-one, which the Court held was properly applicable to the case of children or immediate issue; and then they decided that Oswald was to take only in the event of Henry James not having a child who would attain twenty-one, and therefore that Henry James did not take an estate tail. The cases of *Greenwood* v. *Rothwell* and *Slater* v. *Dangerfield* have also been referred to as cases in which, in consequence of the words being sufficient to give an estate in fee-simple to the issue, the first taker has been held to take an estate for life, and not an estate tail. It occurs to me that Baron Parke, in his judgment in the latter case, put these and similar cases on their proper grounds, namely, that there was nothing in the case showing an intention that the estate was to go over on a general failure of issue; but he seems to admit the propriety of the rule that if the words "limiting the estate over" were on a general failure of issue, that in such case the first devisor would be held to take an estate tail. His only doubt seems to be, whether, in some of the cases, the words which were held to indicate a general failure of issue ought to have been held sufficient for that purpose; which doubt cannot, I think, reasonably exist in respect of the words of the will in this case. Great stress has been laid on the case of *Montgomery* v. *Montgomery*, decided by Sir Edward Sugden. He decided in that case, whether right or wrong, that there was nothing on the face of the will to show an intention that the estate should go over on a general failure of issue in the first taker, but, on the contrary, that the clause relied on for that purpose was merely substitutional. In the case of *Crozier* v. *Crozier* (*a*), he expressly states the rule to be, that if the words in the will were such as showed a clear intention on the part of the testator that the estate should go over in case of failure of issue, then, no matter what the limitations were, they should give way to such intentions of the first devisee to take an estate tail. It is certainly true that in the two recent cases of *Kavanagh* v. *Moreland* and *Woodhouse* v. *Herrick*, before Vice-Chancellor Sir W. P. Wood, he lays down

(*a*) 3 D. & W. 385.

the rule to be that if the words "giving the estate to the issue" are sufficient to give them an estate in fee-simple, that that circumstance alone is sufficient to prevent the first taker taking an estate tail, as in the cases before the Vice-Chancellor. He held the words not sufficient to give an estate in fee to the issue; the question did not necessarily arise before him, and therefore the case before him can scarcely be considered as decisive on the point, though certainly such appears to be his opinion. It has been said that in the case of *Jesson* v. *Wright*, in the House of Lords, the words of the devise were not sufficient to give more than a life estate to the heirs of the body if held words of purchase, and that that was one of the grounds of decision in that case. It is quite true that Sir Edward Sugden, in his argument as Counsel in that case, relies on that circumstance; but it does not appear to me to form any portion of the grounds on which Lords Eldon and Redesdale formed their judgment in that case, nor does it appear to have been so considered in England, as in the case of *Doe* v. *Harvey* (*a*), and *Doe* v. *Goldsmith* (*b*), the words were sufficient to give the heirs of the body estates in fee-simple if they took by purchase; still they were held to come within the authority of the case of *Jesson* v. *Wright*, and that the first taker took an estate tail. Hitherto I have not referred to the cases which arose in the Courts of Law in this country on the subject. I allude to the cases of *Croly* v. *Croly*, *Irwin* v. *Cuffe*, *Briscoe* v. *Briscoe*, *Martin* v. *M'Causland* and *Whitsitt* v. *Thompson*, first before the present Chancellor on a bill for specific performance, and afterwards in the Court of Common Pleas, on a case from the Incumbered Estates Court. No doubt, the ingenuity of Counsel may find some slight variation from the words of the devises in these cases and the devise in the present case; but I can deduce from them only this principle, that when there is a devise to a party for life, and after his death to his issue, in equal shares and proportions, though in words sufficient to pass the fee, yet, that if there is an express devise over on failure or in default of issue of the first taker, that such cases have been considered as coming within the principle of the case

(*a*) 4 B. & C. 610.

(*b*) 7 Taunt. 209.

H. T. 1856.
*Exch. Cham.*
RODDY v. FITZGERALD.

of *Jesson* v. *Wright;* and such is clearly the opinion of the Lord Chancellor in *Whitsitt* v. *Thompson:* and knowing that such has been the opinion of the Profession in this country, and that titles have been taken and money lost in such opinions, I do not feel myself at liberty, sitting here, to be a party to a decision which I have no doubt would have the effect of disturbing titles and causing a considerable quantity of litigation, and am of opinion, that if any such decision is to be made, it should be by the House of Lords, who, I trust, will decide the case on general grounds, which may govern other cases as they arise, and not on any minute distinction calculated only to embarrass persons called on to decide or advise in other cases. In conclusion, therefore, I am satisfied, from a perusal of the will in this case, that the testator intended that, on a general failure of issue of each of his younger sons, the property should go to the others, and should not go to his eldest son Bernard until there was a general failure of issue of all the other sons, and therefore that each younger son took an estate tail, and that the judgment of the Court below should be affirmed.

LEFROY, C. J.

In this case the question is, what estate William Roddy took? whether an estate tail, or an estate for life, with remainder in fee to his children? It has been observed more than once in cases of this kind, that it is impossible to reconcile the decisions; and yet I have found that, as to certain rules or principles of construction, there is, or at least there is professed, a concurrence, almost amounting to perfect unanimity. I have endeavoured therefore to collect these rules or principles, and by their application, rather than by the authority of single cases, to ascertain, in the first instance, the construction of this will, so far as regards the testator's intention. It will be matter of subsequent consideration how far, by the rules of law, effect can be given to the intention expressed in this point of view. It may be observed that the rule in *Shelley's case* is not to be considered as a rule of construction, to ascertain the testator's intention, but when that is ascertained from his own words, to determine if it can be carried into effect

consistently with that rule. But as I have observed, the great object should be, in the first instance, to ascertain the intention of the testator as it is to be collected from the words of the will, the context and all the provisions, not only separately considered, but as they may appear to affect each other. It seems also to be an admitted rule of construction, that ordinary words are to be construed according to their ordinary significations; but that words which have, or have acquired, a definite legal signification, are to be construed, *prima facie* at least, according to that signification. Also, that words capable of different interpretations are to be construed as will best accord with the intention of the testator, manifested by other words or provisions of his will, and that, as far as possible, every word is to have effect, and no word to be rejected in the first instance which conveys a sensible or intelligible meaning—I say, in the first instance, as I am speaking of the rule of construction only at present.

Amongst doubtful words, I think I may take it as admitted that the word "issue" is a word capable of being construed either as a word of limitation or a word of purchase, and that as a word of limitation it imports the whole line of descendants, but as a word of purchase it imports some portion only of the descendants, either a particular class, or a person or persons. That this dubious or flexible character of the word "issue" belongs to it, if any particular authority were required, I cannot refer to a better than the able judgment of Baron Alderson, in *Lees* v. *Mosley* (*a*), in which he shows by an accurate examination of the Statute *de Donis*, the two-fold sense of this word. In the same case we find a valuable observation of that astute and able Judge, Lyndhurst, on the comparison of the word "issue" and "heirs of the body." He says (p. 529):—"The words 'heirs' and 'heirs male' in these cases must "be words of limitation, because heirs are not co-existents—that "does not necessarily apply to issue, which may mean an existing "issue, or all descendants." Baron Alderson also says in the same case, "When the words 'heirs of the body' are used in their proper "sense, it is certain that heirs or successors are meant; therefore

(*a*) 1 Y. & C. 608.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

"a devise to heirs of the body, share and share alike, is an incon-"sistency, but a devise to issue, share and share alike, is not "necessarily so." When the intention of the testator has thus been collected from the words of the will, then arrives the question on the legal effect and operation of the words which let in the consideration of the rule in *Shelley's case*, and thus it is to be determined what estate or estates pass by the will.

Let us now endeavour, according to these rules and principles, when applied to the will in this case, to ascertain what estates it conveys to the objects of the testator's bounty. I shall take the particular devise on which the judgment of the Court below proceeded:—"I give and devise the lands of, &c., to my son William "during his life, and after his death to his lawful issue, in such "manner, shares and proportions as he, by will or deed duly "attested, shall direct, limit or appoint, and, for want of such "appointment, to his issue equally, if more than one, and if only "one child, to said child, and on failure of issue to my son William, "I give and devise the said lands to my son John:" to whom he gives them in like manner as to his son William, with a remainder to his son Thomas in like manner, with an ultimate limitation to his son Bernard, his heirs and assigns for ever.

Here an express estate for life is given to William, and no more in the first instance. When, therefore, the question is asked, whether the estate of William is to be cut down (referring to an estate tail), it is not an accurate way of putting the question. The true question is, whether that estate for life (which alone the testator in the first instance appears to have intended for William) is to be enlarged? I admit it may; and accordingly I admit the words following, "and after his death, to his lawful issue," might enlarge it to an estate tail, and would do so *conclusively* were there no more in the case; but it must be remembered that they would do so only by implication, and for whose sake? not for the sake of William, but for the sake of his issue. If we find then, that this enlargement of William's estate is not from any expressed design of the testator that he should have more than a life estate, how much is the inference that the issue, and not William, were the testator's primary

objects as depositaries of the inheritance, strengthened by the words immediately following.

But before I proceed to observe on these superadded words, let me ask, if the testator's object was to give William an estate tail, why, as he had done so effectually by the former words, "to William for life, and after his death to his issue," why go on to add any further words not needful to give effect to his supposed intention towards William? But he does go on to add, immediately after the word "issue," *in such manner*, shares "and proportions as he, by "will or deed duly attested, shall direct, limit or appoint; and for "want of such appointment, to his issue equally, if more than one, "and if only one *child* to *said child;* and on failure of issue to "my son William, I give and devise the said lands to my son "John," &c. By these words the testator must have meant something; they are not merely insensible, and to be rejected; but as respects William, they have no object; on the contrary, are utterly inconsistent with an estate tail in him.

What the testator's intent was, and what these superadded words import to give, and to whom, I will now examine. They import to give William a power, but only a power to appoint the inheritance, not to himself, but to his issue; and this being the legal effect and operation of the terms in which the power is given, the result is quite clear, indeed it has not been questioned, that the limitation in default of appointment will give to the issue an equivalent estate to that which William might have given by appointment, that is, a fee-simple, as effectually as if it were limited to them, their heirs and assigns: *The King* v. *The Marquis of Stafford* (*a*).

See then the necessary effect of those superadded words, where there has been no appointment, and see their inconsistency with the issue taking an estate tail. By the operation of these words, they must take a fee-simple—they must take the estate as tenants in common, consequently in parcels, and, at the same time, instead of taking it entire in succession, and at different times, according to the devolutions of an estate tail. These words may have their full effect by the issue taking as purchasers, but not if they are

(*a*) 7 East, 526.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

to take by limitation through the ancestor. See also what further evidence is furnished of the testator's intention to give to the issue as *personæ designatæ*, and not as an indefinite line of descendants, by what follows: immediately after the words "to his issue equally, if more than one," he adds, "and if only one *child*, to said *child*." He calls "one issue" one "child." Can anybody then doubt that, in speaking of more issue than one, he meant more children than one, as surely as the word children is the plural of child, and child the singular of children? I am aware that the words child or children would not of themselves avail anything without the superadded words, which operate as effectually to give them the inheritance as purchasers as any express words of limitation to them and their heirs, as I have already shown; and this is what distinguishes the present case from *Jesson* v. *Wright*, where the words child or children were to be found without any superadded words indicating the testator's purpose to make them the root of the inheritance.

I have now gone through this will so far, collecting, according to all admitted rules of construction, what appears to be the intention of the testator, as expressed in his own words, and the legal effect and operation of those words; and I would now ask is there a vestige, thus far, of a preference of his son William to the son's issue as the root and foundation of the future inheritance?

But it is contended that the devise over to his "son John, in case of failure of issue of William," is to control, and indeed annul, every antecedent indication of the testator's intention. Let us see, then, what is the utmost effect that can be given to the devise over as an indication of the testator's intention. It is this, that the estate should not go over whilst there was any of the issue *in esse* to whom it was devised in the first instance. No more can be made of it in point of construction. But that leaves open the question, what is meant by "the issue" to whom it was first devised, and on the failure of which it was to go over? What ground is there, on principle at least, to extend the meaning of the word "issue" to the whole line of descendants, if by clear evidence of intention in the preceding part of the will it was shown to have been used in a more limited sense? Is it not the more correct

reasoning to say that the same word accruing a second time should, at least *prima facie*, be taken in the same sense? Upon this point, Baron Parke has made a very important observation, on the case of *Slater* v. *Dangerfield* (*a*), where he says, "Whether the language "has always been such as to fairly warrant the Court in saying "that the devise over was to take only on a general failure of issue, "and so, reasoning backward, to infer that in the original devise "the word 'issue' extended through all generations, may be matter "of doubt." This is, in my mind, the main error of the Court below, arising from the misapplication of a rule true in itself, and a safe guide in cases to which it applies, but totally inapplicable to the present case. The rule to which I advert is that which was acted upon in *Robinson* v. *Robinson* (*b*), namely, that in order to effectuate the general intent, a particular intent must give way. That case, however, is perfectly distinguishable from the present. The devise in that case was, "to Launcelot Hicks, for his life, "and no longer; and, after his decease, to such sons as he shall "have, lawfully to be begotten, and, for default of such issue, to "William Robinson and his heirs for ever." There are no words, express or implied, under which the sons could take the inheritance as purchasers; they could only take it by vesting it in the ancestor. In the present case, the superadded words enable the issue to take the inheritance as purchasers, and there is, therefore, no necessity to vest it in the ancestor, to enable them to take it. That this was the ground of the decision is clearly shown by Lord Mansfield, in the observations appended to the certificate in *Robinson* v. *Robinson*, to show the necessity, in that case, of applying the will; but his care and precaution to distinguish that case from those like the present appear from the last of those observations (p. 52), in which he says, "That the decision in that case was made without shaking the "authority of *Backhouse* v. *Wells*, and other cases, which have "laid a stress upon the words 'only,' 'not otherwise,' or like "expressions, after an estate for life, together with other clauses "and circumstances in favour of the manifest intent to make the "issue or heir take as a purchaser designed by a personal description."

(*a*) 15 M. & W. 276. (*b*) 1 Burr. 38.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

Let us now look to that case of *Backhouse* v. *Wells*, and like cases, which Lord Mansfield thus specially distinguishes from *Robinson* v. *Robinson*, and we shall find that the single circumstance of difference is, that in them there were words of limitation superadded to the devise to the issue, which were held to furnish sufficient proof of intent that the issue should take the inheritance as purchasers, and that it should not vest in the tenant for life. *Backhouse* v. *Wells* is best reported, as to the contents of the will, in 1 *Eq. Cas.*, p. 184, and, as to the judgment, in *Fortescue*, p. 139. It was a devise to A for life only, without impeachment of waste, and, from and after his decease, to the issue male of his body, and to the heirs male of the bodies of such issue, and, in default of such issue, over: it was decided that A took an estate for life only, and that the issue took the inheritance as purchasers, on the ground of the superadded words. Sir T. Parker says, in his judgment:—"The question is, "whether an estate for life or in tail (in A) is an estate for life, and "not an estate in tail? The word 'issue' has been made equivalent "to 'heirs of the body;' but it is not always so; for otherwise here "the subsequent words of limitation must be rejected"—an observation pointedly applicable to the present case; for, if the superadded words are not to be rejected, I have already shown that they are equivalent in operation and effect to the words of limitation in *Backhouse* v. *Wells*.

In the case of *Loddington* v. *Kime* (*a*), the same effect is given to superadded words of limitation to the issue. The report in *Salk.* says the Court held that the issue here was to be taken as *nomen singulare*, because the inheritance was annexed and limited to the word "issue;" so that the inheritance was in the issue, and not in A the father. In *Lord Raymond*, it is thus reported (p. 205):—"The second question then will be, whether the intention of the "testator appears in this case that the word 'issue' should be "*designatio personæ*, or whether he designed it to be a word of "limitation? And they held that the testator designed it to be a "description of the person, because he added a further limitation "to the issue, viz., 'and to the heirs of such issue for ever.'" In

(*a*) 1 Salk. 224; S. C., 1 Lord Ray. 203.

the case of *The King* v. *Melling* (*a*), Hale, C. J., lays down that if the limitation had been to the issue, or the heirs of the issue, in that case, the word "issue" should be taken as *designatio personæ*. It appears that the case of *Loddington* v. *Kime* was afterwards in effect affirmed by the House of Lords, in *Barnadiston* v. *Carter* (*b*). The case of *Montgomery* v. *Montgomery* (*c*) was decided by Lord St. Leonards on the same principle; and, in *Crozier* v. *Crozier* (*d*), he states expressly that the rule adopted in *Robinson* v. *Robinson*, of the particular intent having to give way to the general, only applied where the will showed a clear intention to include all possible issue, and that they could only take through their parent. I omitted to observe on the case of *Dodson* v. *Grew* (*e*), decided about ten years after *Robinson* v. *Robinson*, showing clearly that the enlargement of a life estate to an estate tail is only applicable when the issue could not otherwise take the inheritance. Chief Justice Wilmot says expressly:—"If both intentions can take place, they ought; that "is, the intention of giving the parent a life estate only, and the "inheritance to the issue" (*f*).

As to the cases cited in the course of the arguments on the other side, I have very carefully considered them all, and they will be found clearly distinguishable from the present, either by the want of superadded words of limitation to the issue, or other circumstances, by which the inheritance could be given to the issue as purchasers. I confess, however, I am more influenced in my judgment by the application of sound, reasonable and well established general principles of interpretation applied to the will, than by the consideration of single cases. There is indeed a class of cases more particularly relied upon in the argument in this Court, as well as in the judgment below, as to which it has been said that, by any decision conflicting with them, we should considerably shake the security of property in Ireland; but I am happy to think that we are not driven to any such inconvenient

(*a*) 1 Vent. 216, 231.
(*b*) 3 B. P. C. 64.
(*c*) 8 Ir. Eq. Rep. 740.
(*d*) 5 Ir. Eq. Rep. 415, 540.
(*e*) Wilmot, 272.
(*f*) p. 275.

H. T. 1856.
*Exch. Cham.*
RODDY
*v.*
FITZGERALD.

necessity; for the present case is separated from these Irish authorities by the same broad and clear line of distinction which separates it from *Robinson* v. *Robinson*, and that class of cases upon which these Irish cases were very properly decided. There was not in any one of them sufficient to enable the issue to take the inheritance as purchasers.

My opinion therefore is, that William Roddy took only an estate for life, with a contingent limitation in fee to his children as tenants in common, if more than one, and if but one, to that one; and, in case of his having no children, to his brothers John and Thomas respectively in like manner, with an ultimate contingent limitation to Bernard in fee, in case the other brothers should die not having had any children.

The Court being equally divided, the judgment was affirmed.

THE QUEEN, at the prosecution of JOHN HICKEY,

*v.*

SIR HUGH MASSY and others, Magistrates for the County of Clare.*

*(Queen's Bench.)*

*Jan.* 19.

A Magistrate having, on the hearing of a complaint for a trespass to a several fishery, remained on the Bench with the other Magistrates during its progress, admitting that he was interested in the subject-matter of the complaint, and stating from the Bench that he could prove that other persons than the complained against person had been fined for fishing in the *locus in quo*, and, after the Court was cleared of the public, remaining with his brother Magistrates until a decision was arrived at, acts mistakenly and improperly; and a decision come to by the Bench of Magistrates under such circumstances is censurable, and will be reviewed in this Court.

In this case, the prosecutor had been convicted by the defendants, residing as Magistrates at the Petty Sessions of Doonas, in the county of Clare, for a trespass on the several fishery of Hayes O'Grady. In Michaelmas Term last, a conditional order was obtained, on behalf of the prosecutor, for a prohibition to the Magistrates, forbidding them enforcing this conviction, on the ground that the Magistrates had no jurisdiction to entertain the complaint, their jurisdiction being ousted by the fact of a question of title having risen on the investigation of the complaint. Cause was shown against this conditional order in Michaelmas Term, and the Court allowed the cause, being of opinion, upon the affidavits filed in support of the conditional order, that no sufficient *prima facie* case of adverse user by the public had been shown, and that, so far as any *prima facie* case had been shown, it was displaced by the affidavits filed as cause.

A conditional order was then obtained in the original cause of *Hickey* v. *O'Grady*, for a writ of *certiorari*, directed to the said Magistrates, to remove into this Court the conviction so pronounced by the Justices, on the ground that the said conviction was illegal and void, Sir Hugh Massy, one of the convicting Justices, being the owner, or one of the owners in fee of said lands, and of said fishery, and, as such, interested in the adjudication of said complaint.

*Sir C. O'Loghlen* (with him *Joshua Clarke* and *Charles Barry*), showed cause against this conditional order, and—

* *Coram* CRAMPTON and PERRIN, JJ.

H. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
MASSY.

*James Murphy* and *Brereton*, contra.

The affidavit in support of the conditional order stated that, at the hearing of the summons against the prosecutor, Sir Hugh Massy sat on the Bench during the time in which the complaint was being heard, and took part, as a Magistrate, in hearing and deciding same, and that he stated, before a decision was come to, that he had known persons to have been fined in that Court for having fished in that portion of the river where, it was alleged, the prosecutor had trespassed. That an application was made on behalf of the prosecutor, that the fine of ten shillings, imposed upon him for the alleged trespass, should be increased in amount, to enable him to appeal; inasmuch as by 14 & 15 *Vic.*, c. 92, no appeal lay for a conviction under the amount of twenty-one shillings. That two of the Magistrates assented to this application, but the majority voted against same being complied with; that Sir Hugh Massy was one of the majority, and remained in Court during the consultation, on the Bench, although the Court was directed to be cleared of all but the Magistrates and their clerk.

The affidavit of Hayes O'Grady, filed as cause against this conditional order, deduced title to the fishery under a lease from Sir Hugh Massy; and alleged that said fishery was situate above the tidal part of the river, and that he, and those under whom he derived, enjoyed this several and exclusive fishery for upwards of sixty years. That Sir Hugh Massy had substantially no interest in the fishery, and, although present at the inquiry before the Magistrates, he took no part directly or indirectly in said proceedings, or in hearing or deciding on said summons; but the affidavit admitted that, when the witnesses for the prosecutor were asserting that the fishery had been for sixty years open to the public, without hindrance, Sir Hugh Massy stated that he was, as a witness, prepared to prove that he knew of persons having been fined for fishing in said portion of the river; and the affidavit further stated that it was entirely untrue that Sir Hugh Massy voted with the majority, or acted at all as a Magistrate on said hearing.

Sir Hugh Massy also made an affidavit, and positively denied

having taken any part in the hearing of the complaint, or in the decision thereon, or having, in any way, influenced the decision; but that, before the complaint was heard, anticipating that his name would be mixed up with Hayes O'Grady's title, publicly and in the hearing of every one in Court, and as he believed of Hickey, he stated that he would take no part in the proceedings.

The following cases were cited:—*The Queen* v. *The Justices of Suffolk* (*a*); *Regina* v. *The Justices of Surrey* (*b*).

CRAMPTON, J.

One of the principal duties of this Court is to control the acts and decisions of inferior tribunals; it is not only important that they should be pure, but also that it should appear that nothing like private interest should interfere with their decisions. Now I am satisfied that Sir Hugh Massy stated what he believed to be the truth, and that what he has done was not intended to interfere with the course of justice; but my Brother PERRIN and I have arrived at the conclusion that, whether there was an actual interference or not in the hearing of this petty case, yet that the public, as well as the prosecutor, might well have been under the impression that there was an interference. My own impression is that, although Sir Hugh Massy thought he did not interfere, yet that he did substantially interfere, not in voting, but in producing the result at which the Magistrates have arrived. The grounds on which I have arrived at this conclusion are these:—He states that he was interested, and he declared that he would take no part in the proceedings, and he remained sitting on the Bench. Now I do not mean to say his mere sitting on the Bench would make him a party to the decision; upon that point alone, I should say there is not a sufficient ground for granting the *certiorari*; but his admission that he was interested, and his continuing to sit with the other Magistrates, and his important declaration from the Bench, at the calling on of the case, are what this Court cannot give its sanction to. He might have said that he wished to be examined as a witness, and that he could verify his declaration; but he does not follow that

(*a*) 18 Q. B. 416. (*b*) 1 Jur., N. S., 1138.

H. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
MASSY.

course, but takes upon him to declare the evidence of a witness to be untrue. I cannot suppose that such a declaration, from such a quarter, had not its effect; I will not say that it had, but it may have had effect. The traverser was convicted in a penalty of ten shillings; and the party convicted, desiring to have the right tried, offered to appeal (and whether such party be a pauper or not makes no difference); he had a right to have his appeal, on payment of the required sum. What next is done? An order is made by the Magistrates that the public should withdraw; Sir Hugh Massy, notwithstanding, remains in Court. He did not give a vote in the decision of the Magistrates, but he remained in Court with them with closed doors, and when the doors were opened the majority declared their determination to refuse the application. That order was made by the Justices present. Sir Hugh Massy should have separated himself from them: *prima facie*, he appeared to be one of the Magistrates making the order.

It is said that his merely sitting on the Bench was not wrong; perhaps it was not; but he from the Bench made himself a witness against the party, and though not sworn, his words may have had as much weight with his brother Magistrates as if he had been sworn. I therefore think he did take a part, and an improper part, in the proceedings. But he took another step; at the conclusion, the public were excluded and the doors were closed, and the Magistrates remained to confer in Court; Sir Hugh Massy remained with them. Why did he do so? That was a mistake on his part. It is quite possible that Sir Hugh Massy may not have been aware of the effect his presence might produce upon the Justices; but it is possible that, in deference to his opinion, the Magistrates did not allow the appeal. I therefore cannot come to the conclusion that he did not interfere. We are not now deciding the question, but putting the case in train for investigation; and unless the parties come to some arrangement, we must make this order absolute.

PERRIN, J.

I concur in opinion with my Brother CRAMPTON, that it is of the utmost importance that strict and sedulous care should be paid

H. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
MASSY.

to a case of this kind. The question here is, whether or not the conduct of Sir Hugh Massy on this occasion was such as became him as a Magistrate? He says in his affidavit that, anticipating his name would be mixed up in the matter, he said, in the hearing of every person present, that he would take no part in the proceedings; and he further swears that he never directly or indirectly took part in the proceedings. I have no doubt he states what he considers the truth; but the question is, what is taking part in the proceedings? He admits, in order to evade the appeal, that while Hickey sought to establish a public fishery in the *locus in quo* against him as reversioner, he stated he could prove that others had been fined for fishing in this fishery. He states that positively, and yet the cardinal point in the case is, whether there was a several fishery? What does he mean by saying he could prove that persons had been fined? What but that he could contradict the evidence of the prosecutor here, that there was a public fishery? He may have been unaware of his own conduct, or may have forgotten the respect due to his station, when he stated he would take no part in the proceedings, and acted as he did; for it appears to me that he did take part, and a most important part in them, and, not satisfied with that, remained in Court with the other Magistrates until the decision was arrived at.

Order absolute.

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## GLENNISONS *v.* BELLEW.

E. T. 1857.
*April* 20.

In the summons and plaint, the plaintiffs were described as Edward Glennison and Edward Fils, trading under the style of "Glennison et Fils;" at the trial it appeared the plaintiffs were father and son, viz., Edward Glennison and Edward Glennison jun.—*Held*, this was a misnomer, not a misjoinder.

This was an action for goods sold and delivered. The defence traversed the sale of the goods by the plaintiffs to the defendant. The case was tried before Moore, J., at the Sittings during Hilary

E. T. 1857.
*Queen's Bench*
GLENNISONS
v.
BELLEW.

Term 1857, in the Consolidated Nisi Prius Court. In the summons and plaint, the plaintiffs were described as Edward Glennison and Edward Fils, trading under the name of "Glennison et Fils."

Previous to the trial, the plaintiffs served notice on the defendant, cautioning him against defending the action, on the ground of misnomer of one of the plaintiffs. To this notice the defendant replied, stating that he defended the action on the ground of non-joinder of Edward Glennison the younger, and the misjoinder of a party with whom he had never contracted.

At the trial, it appeared that the parties who sold the goods were Edward Glennison sen., and Edward Glennison jun.; and the plaintiff having refused to amend, the learned Judge, being of opinion that there was a mis-joinder of parties, directed a nonsuit.

A conditional order having been obtained to set aside this nonsuit—

*Purcell* showed cause.

This is not a misnomer; the true principle is that laid down in the case of the *Mayor and Burgesses of Lyme Regis* (*a*):—"As to "these words, *per idem nomen et non per aliud;* that this word *idem* "has two significations: *scil.*, *idem syllabis seu verbis* and *idem re et* "*sensu*, and the name of a corporation in grants or conveyances "need not be *idem syllabis seu verbis*, but it is sufficient if it be "*idem re et sensu.*" In this case, Edward Fils may be a partner of the firm and not a party to the contract: *Longridge* v. *Brewer* (*b*). That was an action of assumpsit by three co-plaintiffs for breach of contract; they were rightly named in the writ, but the surname of one of them was omitted in the declaration by mistake, and also in the issue and Nisi Prius record; and defendant pleaded a tender and paid money into Court, and at the trial failed in proving the tender; and the Jury, after an objection had been taken as to the omission of the surname, found a verdict for the plaintiff, with nominal damages only, and leave was given them to move to increase it to the extent of their demand if the Court should be of opinion that the omission was immaterial. The Court discharged a rule obtained for that purpose, as the plaintiffs might have amended

(*a*) 10 Rep. 123 *a*. (*b*) 7 Moore, 522.

the pleadings and record at any time before the trial; and as they had their remedy by bringing a fresh action.

*E. M. Kelly*, contra.

It is admitted that the actual parties suing here were the persons by whom the goods were sold and delivered to the defendant; the simple question therefore is, whether the fact of one of the plaintiffs having been called "Fils" instead of "Glennison" is a ground of nonsuit? Misnomer of the plaintiff, or of one of several plaintiffs, never was pleadable in bar of the action, or otherwise than in abatement: *Morley* v. *Law* (*a*); *Trustees of Taunton Market* v. *Keinberley* (*b*); *Boughton* v. *Frere* (*c*); *Mayor of Stafford* v. *Bolton* (*d*); *Jowett* v. *Charnock* (*e*); and this plea in abatement is taken away by the statutes 3 & 4 *Vic.*, c. 105, s. 40, and the Common Law Procedure Act (1853), s. 84. The defendant has mistaken his course here, which should have been as pointed out by these statutes, namely, a summary application to a Court or Judge to amend the summons and plaint.

*Purcell* replied.

LEFROY, C. J.

This nonsuit must be set aside, having regard to the present state of the law and the pleadings.

MOORE, J.

At the trial, I was of opinion this was a case of misjoinder, and not of misnomer, and if so it could have been taken advantage of by a plea in bar; but the authorities establish it was a misnomer merely, and not a misjoinder, and that objection could not be taken advantage of at the trial.

CRAMPTON, J., concurred.

Nonsuit set aside without costs.

(*a*) 2 Br. & B. 34.
(*b*) 2 Wm. Bl. R. 1120.
(*c*) 3 Camp. 29.
(*d*) 1 B. & P. 40.
(*e*) 6 M. & S. 45.

E. T. 1857.
*Queen's Bench*

## GOVERN *v.* ROWLAND.

*April* 21, 22.
*May* 5.

A defence of justification to an action of trespass relied on a civil-bill decree against the plaintiff, and two others; the plaintiff replied, alleging that, at the time the decree was obtained, service of process had not been made, and that one of the defendants in the civil-bill was out of the jurisdiction of the Assistant-Barrister; and it further stated that the Assistant-Barrister had been induced by the now defendant to sign an original decree, instead of a renewal of a former decree. —*Held*, on demurrer, that the decree being formal on the face of it, and unappealed from, was conclusive, and that its validity could not be questioned in the present action. —CRAMPTON, J., *dissentiente*.

ASSAULT and false imprisonment.—The first count of the summons and plaint in this action stated that the defendant, to wit, on &c., with force and arms, assaulted the plaintiff, and seized and laid hold of him, and, with great force and violence, pulled and dragged him about, and then forced and compelled him to go in custody along a certain street called Trinity-street, in the town of Drogheda, and along and through divers streets, to a certain yard, and then and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for a long space of time, to wit, for the space of one hour then next following, contrary to law, and against the will of the plaintiff; whereby the plaintiff was then and there not only greatly hurt, bruised, wounded and injured, but was exposed and injured in his credit and circumstances. The second count complained that the defendant, with force and arms, again assaulted the plaintiff, and again beat and ill-treated him. The third count complained that the defendant, with force and arms, again assaulted the plaintiff, and then beat, bruised and ill-treated him, and then again imprisoned him, and kept and detained him in prison, without any reasonable or probable cause, for the space of seventeen days next following, contrary to law, and against the will of the plaintiff. The fourth count complained that the defendant, on &c., again assaulted plaintiff, and seized and laid hold of him, and, with great force and violence, pulled and dragged him about, and forced and compelled him to go along divers streets, to a certain common gaol in Drogheda, and again imprisoned the plaintiff, and kept and detained him in prison, without any reasonable or probable cause, for seventeen days, and until the plaintiff was obliged to pay and deposit £20. 10s. 11d., in order to procure his release from the said gaol, contrary to the laws, and against the will of the plaintiff=

and was then and there not only hurt, bruised, wounded and injured, but was imprisoned during the time aforesaid in said gaol, and was, during said time, prevented from attending to and transacting his necessary affairs and business, and greatly exposed and injured in his credit and circumstances, and was obliged to pay a large sum of money in order to procure his discharge from the said gaol; and plaintiff complains that, by reason of the premises, he has sustained damage to the amount of £300, and his costs.

The defences were, as to the assaulting the plaintiff, and seizing and laying hold of him, and with great force and violence pulling him and dragging him about, and assaulting and again beating and ill-treating him, and bruising him, in the first, second, third and fourth paragraphs of the plaint mentioned, the defendant says that he did not assault the plaintiff as alleged.

Secondly; as to the imprisonment, in the first, third and fourth paragraphs mentioned, the defendant says that the plaintiff, and one Terence Govern and one Thomas Govern, being justly indebted to the defendant in £20, on an account stated between them and the plaintiff, and the said Terence Govern and Thomas Govern, having neglected and refused to pay unto the defendant the said sum of £20, or any part thereof, and the said plaintiff, and John Govern and Thomas Govern, being all resident in the county of Meath, and within the jurisdiction of the Assistant-Barrister of the said county, and within the division of Kells in the said county, the said defendant caused the plaintiff and Terence Govern and Thomas Govern, being all resident within the division of Kells, in the said county of Meath, to be regularly served with a civil-bill process, and thereby required them personally to appear before the Assistant-Barrister at Kells, in the said county of Meath, at the October Sessions held in 1854, to answer the now defendant the said John Rowland's bill for the said sum of £20, so due and owing by the plaintiff and Terence Govern and Thomas Govern, and that, in default thereof, the said Assistant-Barrister would proceed as to justice should appear. And the defendant further saith that, on the 11th of October 1854, the said civil-bill came on to be heard at Kells, in the said county,

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

before the Assistant-Barrister, at the Quarter Sessions for the said county of Meath; and, it appearing to the Court that process to appear at the said then Sessions was duly served on the said plaintiff, and on the said Terence Govern and Thomas Govern, and that the said plaintiff, and the said Terence Govern and Thomas Govern, were justly indebted to the said John Rowland in the said sum of £20, it was therefore ordered and decreed by the said Court that the said John Rowland should recover from the plaintiff, and Terence Govern and Thomas Govern, the said sum of £20, together with 9s. 6d. costs. And the defendant says that the said civil-bill decree was duly signed by the Assistant-Barrister, and by the Clerk of the Peace for the said county of Meath, and also by the attorney for the said John Rowland; and the said defendant further saith that no appeal was made by the said plaintiff, or the said Terence Govern or Thomas Govern, from the said decree, and that the said civil-bill decree being in full force and effect, and the said sum still remaining unpaid, the said John Rowland appeared before the Assistant-Barrister of the said county, at the Sessions holden at the said division of Kells, in the said county of Meath, on the 27th of December 1855, and then and there made an affidavit, in open Court, that there remained still due by the said decree at Kells aforesaid £20, and 9s. 6d. for costs; and it was thereupon ordered and decreed by the said Court that the same should be, and the same was, thereby renewed for the said sum, together with the sum of 1s. 4d., costs of the said renewal; and that the said John Rowland should have and recover from the now plaintiff, and the said Terence Govern and Thomas Govern, the same; and the several Sheriffs of the counties and cities within the kingdom of Ireland were thereby commanded, notwithstanding any liberty within their bailiwicks, that they should enter the same, and take in execution the bodies of the now plaintiff, and the said Terence Govern and Thomas Govern, to satisfy and pay the said sum and costs; which said renewal was duly signed by the said Assistant-Barrister and the said Clerk of the Peace for the county of Meath, and also by the attorney for the said John Rowland. And the defendant further saith that the said renewal being

rce and effect, the Sheriff of the county of Meath, on &c., is hand and seal, authorised and empowered certain bailiffs named to execute the said renewal. And the defendant saith that the said renewal being in full force and effect, e said sum of £20. 9s. 6d. therein mentioned being all still d owing, and the plaintiff being, on the 12th day of May in the county of the town of Drogheda, the said John Row- bbtained a warrant, under the hand and seal of the Sheriff county of the town of Drogheda, bearing date, &c.; and aid Sheriff of the county of the town, &c., thereby authorised mpowered Richard Loughran, therein described, and John ill, of Drogheda, in the county, &c., or either of them, and assistants, to execute the said renewal. And the defendant er saith that the said plaintiff was thereupon arrested in town of Drogheda by the said John Hamill and his assistants, r and by virtue of the said warrant, and kept and detained rison until he satisfied and paid the said debt and costs, which is the imprisonment in the summons and plaint men- ed. And the said defendant further saith that, on payment the said sum of money in said renewal mentioned, the plaintiff forthwith discharged from prison; and therefore he defends action.

Replication to the second defence; that, before the 12th day of ay 1856, the plaintiff, by the name and description of "John owland, of Callan in the county of Louth, merchant," duly ob- ined, out of the Court of the Assistant-Barrister for the county Meath, at the Quarter Sessions held at Kells in the said county, the 15th day of October 1849, a civil-bill decree against the laintiff herein, and one Terence Govern and Thomas Govern, y the description of "John Govern and Terence Govern, of Rath- enny, and Thomas Govern, of Kilbery," all in the county of Meath, farmers, as defendants, for the sum of £20, on a W. O. U., dated 18th of February 1849, together with 6s. 3d. costs of said decree; and, at the time the said decree was made, the parties plaintiff and defendants therein were respectively resident as therein described, and that the said decree was duly made; and after the

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

making of said decree, and before the 28th of September 1854, the said John Rowland had changed his place of residence to Laurence-street, in the county of the town of Drogheda; and the said Thomas Govern had, before the day and year last aforesaid, ceased to reside in the county of Meath, and was then resident in the county of the town of Drogheda. And the plaintiff says that the defendant herein, in order to have said decree renewed, caused and procured a certain notice of renewal, bearing date the 28th of September 1854, and signed by the defendant herein, to be served, on or about the said last mentioned day, upon the plaintiff and Terence Govern and Thomas Govern, not being then, nor for a long time before, to wit, for six months previous and upwards, resident within the jurisdiction of said Assistant-Barrister; and that the defendant caused the said notice to be entered for hearing before the Assistant-Barrister, at the Quarter Sessions held for said county at Kells, on the 11th of October 1854; but did not make, or cause to be made, any affidavits, as required by law in that behalf, to renew the same; and that the defendant herein, nevertheless, procured an order in said Court to renew said decree, and which is entered as of record in the books of said Court. And the plaintiff says that the defendant thereupon, by his attorney in said Court, instead of taking out thereon a renewal against said John Govern and Terence Govern of said original decree, bearing date as aforesaid, the 15th of October 1849, caused and procured a civil-bill, numbered 81, at said Sessions, to be signed by the Assistant-Barrister, and by the Clerk of the Peace of said county, and also by the attorney. And the plaintiff says that he and the said Terence Govern were not served with any civil-bill process, returnable at said Sessions, in respect of the sum of £20, mentioned in defendant's second defence, or of the cause or causes of action in said decree mentioned, other than and except the said notice of renewal. And that the said Thomas Govern had not been served with any civil-bill process, returnable at last mentioned Sessions, in respect of said decree, and was not then, nor for a long time before, to wit, for the period of six calendar months previous to said 11th day of October 1854,

and upwards, resident within or amenable to the jurisdiction of said Assistant-Barrister; and the said last mentioned decree, so signed, was not duly made by the said Court, and was not lawfully sued forth out of same by the defendant herein. And plaintiff says that no civil-bill process, returnable at said Sessions, and on which said last mentioned decree could be lawfully issued, was served at suit of the said John Rowland, against the said John Govern, Terence Govern and Thomas Govern, and that they were not at all resident there within the jurisdiction of said Assistant-Barrister, as alleged; and that the defendant afterwards, on the 27th of December 1855, when more than six years had elapsed from the making of said original decree, and at a Quarter Sessions held at Navan in said county, caused and procured one Thomas George Rowland, being the son and manager of the defendant herein, to make in said Court the usual affidavit to renew said alleged decree of the 11th of October 1854; and the defendant caused and procured thereupon a certain renewal, dated at Navan, 27th of December 1856, purporting to be a renewal of an alleged decree of 11th of October 1855, to be sued forth out of said Court, and to be signed by the said Assistant-Barrister and Clerk of the Peace, and by the attorney in said Court of the defendant; whereas the plaintiff avers that no original decree, bearing date the 11th day of October 1855, had been obtained by the said John Rowland against the said John Govern, Terence Govern and Thomas Govern, as stated in said last mentioned renewal. And the plaintiff says that no civil-bill process at said last mentioned Sessions had been served at suit of John Rowland against the parties named as defendants in said renewal, and that said alleged renewal was without notice to them, and that more than six years had elapsed after the making of the original decree aforesaid, bearing date the 11th of October 1849, before the said last mentioned renewal had been made; and that said Thomas Govern was not resident in the said county of Meath, nor within the jurisdiction of the said Assistant-Barrister, when said renewal was obtained. And the plaintiff says that, although said renewal was signed by the said Assistant-Barrister of said county, and by the Clerk of the Peace of said county, and

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

by said attorney, that the same was not duly made according to law by said Court, nor lawfully sued forth out of same by the now defendant.

Demurrer by the defendant to this replication.

*J. A. Curran* and *Battersby*, for the demurrer.

This replication attempts to put in issue inference and matter of law, whether a civil-bill decree, of the 11th of October 1854, was duly made by the Court or lawfully issued out of the Court; and whether the renewal of said decree, obtained the 27th of December 1855, was duly made. This question is raised, although the decree and renewal were duly made and signed, and upon process duly served.

Again, the replication puts in issue another matter of law, viz., whether the civil-bill decree and the decree for renewal, though duly signed, are valid, although they are unappealed from and unreversed, and made by the statute 14 & 15 *Vic.*, c. 57, final and conclusive. Besides, there is no averment of the identity of the decree with that stated in the defence. The replication also puts in issue facts which might have been proper for the adjudication of the Assistant-Barrister before making the decree, but which must be taken to be concluded; and thus attempting to go behind the decree is questioning the judgment of a Court of competent jurisdiction, in full force and unreversed. The Court of the Assistant-Barrister is created by statute, and is to be governed by statute, and not by the rules which govern Courts of inferior jurisdiction at Common Law; it is a Court of Record, and its judgment cannot be contradicted, and its decree, unappealed from, is final. It appears on the pleadings there was a debt, and parties living within the jurisdiction, and that the parties were present in Court at the time of making the decree. It must be assumed that the Assistant-Barrister did his duty, and inquired into the service of the process and the residence of the parties; no fraud is alleged, and, for all that appears, the decree may have been had on consent. But it is not necessary that all the parties to a joint or joint and several contract should be resident within the jurisdiction of the Barrister

at the time of making the decree, or of service of process. It may be argued that the defendant should have pleaded an estoppel, by way of rejoinder, having pleaded the decree in his defence as conclusive, but this is not compulsory.

They cited 14 & 15 *Vic.*, c. 57, ss. 65, 133; *Riddell* v. *Pakeman* (*a*); *Batters* v. *Wall* (*b*); *Condon* v. *Earl of Kingston* (*c*); *Comerford* v. *Watson* (*d*); *Brittain* v. *Kinnaird* (*e*); *Pickram* v. *Gaskin* (*f*); *Durant* v. *Tomlins* (*g*).

*D. C. Heron* and *H. Smythe* (with them *D. Lynch*), contra.

The replication clearly shows that the Assistant-Barrister had not jurisdiction to make and sign the civil-bill decree of the 11th of October 1854, because no civil-bill process was served, to warrant the making the decree. The decree was against three persons jointly, and all of the defendants were not resident within the county of Meath, nor amenable to the jurisdiction of the Civil-bill Court. Besides, it appears on the replication that the decree issued and signed by the Barrister, and alleged in the defence, was another and different decree, of another nature from the order made in open Court on the hearing, and entered of record, and the plaintiff was deprived of appealing therefrom, because he had no notice of it until after his arrest; and any appeal from a decree must, by the statute, be made to the next Assizes after the date of the decree. Then the alleged renewal of the 27th of December 1855 purports to be a renewal of an original decree of the 11th of October 1854, and from the record there does not appear any such original decree; besides, by law, an original decree is in force for a year, and can only be renewed every six months. The defence avers the service of process, and that the defendants in the decree were resident within the jurisdiction. Surely the plaintiff was bound to traverse these allegations, and put defendants on proof of them, or else disprove them by substantial averment. It is to be remembered

(*a*) 2 C., M. & R. 30.
(*b*) 4 Ir. Jur. 302.
(*c*) 7 Ir. Jur. 247.
(*d*) 5 Ir. Jur. 37.
(*e*) 1 Brod. & Bing. 432.
(*f*) 2 Hud. & B. 246.
(*g*) 1 C. & M., Conn. Cas., 135.

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

that the Civil-bill Court is a Court of inferior and limited jurisdiction; and if its decree be pleaded as a justification of a trespass, the plaintiff is entitled to reply matters showing a want of jurisdiction. The demurrer admits the facts stated in the replication, and these are sufficient to entitle the plaintiff to judgment. The decree does not state the last known residence of the parties, and is therefore null and void; for the 14 & 15 *Vic.*, c. 59, s. 61, so expressly requires; how then could such decree be renewed? The Barrister's Court being either one of special or inferior jurisdiction, within the Common Law Procedure Act 1853 (16 & 17 *Vic.*, c. 113, s. 67), it is enough to have stated in the replication that the decree and renewal were not duly made by the Court of the Assistant-Barrister, because that statement puts in issue, and requires the plaintiff to prove, the facts necessary to give the Court jurisdiction. If the decree were an estoppel, it should have been pleaded as such. They cited *Thompson* v. *Blackhurst* (*a*); *Briscoe* v. *Stephens* (*b*); *Dennis* v. *Rowls* (*c*); *Lessee Coffee* v. *Rahilly* (*d*); *Betty* v. *Nail* (*e*); *Moore* v. *O'Donnell* (*f*); *Davies* v. *Evans* (*g*); *Williams* v. *Bagot* (*h*); *Ferguson* v. *Mahon* (*i*); *Marshalsea case* (*k*); *Williams* v. *Jones* (*l*).

*Battersby* replied.

*Cur. ad. vult.*

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*May* 5.

MOORE, J., delivered judgment.—[His Lordship, after stating the pleadings, proceeded]—

This replication is not a eulogy on the Common Law Procedure Amendment Act; under the old system of pleading, the plaintiff would have been confined to some specific ground impeaching the justification, but in the present pleading he sets up various objec-

(*a*) 1 Nev. & M. 266.
(*b*) 2 Bing. 213.
(*c*) 2 Lut. 913.
(*d*) 1 Jones, 274.
(*e*) 6 Ir. Com. Law Rep. 17.
(*f*) 6 Ir. Com. Law Rep. 46.
(*g*) 5 Ir. Jur. 274.
(*h*) 3 B. & C. 772.
(*i*) 11 A. & E. 179.
(*k*) 10 Rep. 68.
(*l*) 13 M. & W. 628.

tions—that he was not served with process, that a co-defendant was out of the jurisdiction, that the decree was not duly had, and then sets out a series of proceedings beginning in 1849, and on each and all of these the Court is invited to rest its judgment. As to the point that the defendants in the civil-bill were not served with process, I am of opinion that there is an estoppel on the plaintiff setting up that objection; by the 36 *G.* 3, c. 25, s. 22, analogous to 14 & 15 *Vic.*, c. 65, it is enacted "that no decree shall be made by the "said Assistant-Barristers, or any of them, in any cause, unless "the process in such cause shall, by the oath of one or more wit-"nesses, examined on oath, in open Court before the Assistant-"Barrister, be satisfactorily proved to have been served," &c. The Assistant-Barrister must therefore officially decide on the question of service, and it must appear on the decree that that process was duly served. By the 29th section of 36 *G.* 3, c. 25, an appeal is given from such decree to the going Judge at the next Assizes, and by the 32nd section it is provided, if there be no appeal from such decree, it shall "be absolutely final to all intents and purposes, "and shall not be subject to be removed by any writ of error or "otherwise, to any other of his Majesty's Courts, or capable of being "reversed," &c. How then can it be said a decree unappealed from is final, if its validity be questionable, on the want of due service of process?

It is said a party ought not to be bound by a decree, because he had no notice of it; but surely when the Sheriff comes to execute the decree, the defendant must necessarily be apprised of its existence, and may dispute its force; but if he do not, and pay the debt, as in this case, and no appeal is lodged, then I think that 32nd section conclusive on his right, unless on the face of the decree there appear a defect of jurisdiction. The 27th section of the 36 *G.* 3 provides against a renewal of a decree or dismiss after being made six years, but within that period either may be renewed; so that if this decree were a nullity, because of non-service of the process, a bad decree could not be made good by renewal; and if, within the six years, the plaintiff should execute his decree so obtained, he would be liable as a trespasser if he were unable to give proof of due service.

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

I cannot think that the Legislature intended that the plaintiff should be at all times prepared with the proofs of service on which his decree was had; and, therefore, I am of opinion the question of non-service cannot be raised in a collateral proceeding.

Then it is objected that there are three persons defendants in the civil-bill, and one of them, Thomas Govern, was out of the jurisdiction at the time the decree was obtained, and it, therefore, could not be valid against him, and being invalid as to him, it is equally so against the co-defendants. But this objection is not made by Thomas Govern, or for his protection, but by Terence Govern, who was within the jurisdiction at the time. The Assistant-Barrister has jurisdiction only against those within his county; but this objection has been raised, on the ground that a joint contract must be followed by a joint judgment; and that principle is not applicable here. The 11th section of 36 *G.* 3, c. 25, says:—"No "defendant shall be liable to be sued or proceeded against by "authority of this Act, or obliged to appear in any cause, &c., "unless there shall be more than one defendant in such cause, "in which the plaintiff shall be at liberty to bring his action "in such division of the county where any one of the de-"fendants shall so live or reside." Independently of that, this replication contains no averment of the fact that Thomas Govern was out of the jurisdiction, so that he could not have been served with process. It avers that he was resident in the county of Meath, then that he went to reside in the town of Drogheda; but if a man be within the jurisdiction of the Assistant-Barrister, and duly served with process, it is plain that his going out of that jurisdiction subsequently will not invalidate the service; and it is quite consistent with the averment in the replication that Thomas Govern did reside in Meath, and left it after being served with process; and it appears to me that as the defence is confessedly good, it ought not to be displaced or nullified by a replication alleging that there was not a due service.

It was stated at the Bar that this decree was obtained by fraud, and this allegation was founded on some averment in the

replication; but there is nothing in the replication, save inference, whence the Court could deduce fraud. The allegation is that, instead of taking out a renewal of the decree of 1849, an original decree was taken out, and that is the imputation of fraud. But the renewal of a decree is as valid and effectual as the original during a year, and, if fraud were contemplated, I cannot imagine what purpose was to be accomplished by it. But it would be necessary, to invalidate the defence, to show that the decree relied on by the defendant was the very decree that had been fraudulently obtained. No such averment appears on the pleading; and that objection is also unfounded.

On the whole, I am of opinion that the demurrer should be allowed.

PERRIN, J.

I concur in opinion with my Brother MOORE: I think the defence a valid one, not traversed or denied by the replication; and, on the terms of the 14 & 15 *Vic.*, c. 57, s. 133, it appears to me impossible to hold it is not a sufficient answer to the action. That is the analogous section to the 32nd section of 36 *G.* 3, c. 25, and is in these words:—"Such decrees and dismisses as shall be "made and pronounced by such Chairman, Recorder and Assistant-"Barristers respectively, shall, in case there shall be no appeal "therefrom, be absolutely final, to all intents and purposes, and shall "not be subject to be removed by any writ of error or otherwise, "to any other of her Majesty's Courts, or capable of being re-"versed," &c. The replication does not traverse the defence setting out the decree, whence it appears service was duly had on the defendants; that they were justly indebted to the plaintiff; that there was an order for payment of the money proved due; and, that there was no appeal. What then does the replication? It sets out a series of facts and vague allegations—such as that, under pretence of granting a renewal, the Barrister was prevailed upon to grant an original decree, and that there was no process returnable upon which this decree could be had; and all this though the 65th and 133rd sections of 14 & 15 *Vic.*, c. 57, provide, that no

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

decree shall be had, unless on satisfactory proof of service; and that such decree, unless appealed from, shall be final. The Court would be repealing these provisions of that statute, were we to hold that, in a proceeding in this Court, the service of process in the Civil-bill Court could be questioned after decree. To my mind, that 133rd section is conclusive on the point; the defence relies on it, and is therefore good; the replication does not traverse its material averments, and, therefore, the demurrer should be allowed.

CRAMPTON, J.

I am of opinion that the demurrer in this case should be overruled; and I rest my judgment upon these two positions:—first, I think the Assistant-Barrister had not jurisdiction to pronounce the decree relied on by the defendant; and secondly, I think the result of the pleadings is that the decree was obtained by fraud—either ground would be sufficient, but both seem to me to exist in this case.

The action is an action for assault and false imprisonment. The plea justifies *both* under a civil-bill decree, dated the 11th of October 1854. That decree was a decree against the plaintiff John Govern, Thomas Govern and Terence Govern jointly, for a sum of £20 due upon an account stated.

It is perfectly regular on the face of it, alleging that the three defendants were all within the jurisdiction, and had all been duly served with the process. The plea also avers the same in fact, namely, that the three defendants were all within the jurisdiction, and had been duly served.

The replication states that five years before, viz., on the 15th of October 1849, the defendant had obtained a decree against the three defendants jointly, for the sum of £20, due on foot of the defendant's W. O. U.—a decree the same in all respects as that of 1854, save in the date, and save that in one the £20 is stated to be due on an account stated, and in the other on the W. O. U., a mere formal difference.

The replication further alleges that, on the 28th of September 1854,

the defendant served on the plaintiff and on Terence Govern a notice for renewal of the decree of 1849; the third defendant in that decree being then and for some time previous thereto resident in Drogheda, out of the jurisdiction of the Assistant-Barrister.

That the case was entered for hearing on this notice, and that an order was made by the Court for renewal of the decree, No. 81. That, however, instead of taking out a renewal, as ordered by the Court, the defendant's attorney caused and procured a civil-bill decree, No. 81, on the 11th of October 1854, at the said Sessions, to be signed by the Assistant-Barrister, the Clerk of the Peace, and the defendant's attorney, for the same sum of £20, and against the same three defendants, as in the decree of 1849. That the decree of 1854 was renewed, upon an affidavit, and the plaintiff arrested thereunder, and thereby compelled to pay the amount thereof. Why it was that the new original decree was substituted for a renewal, we can only conjecture; the fact, however, is stated that there was no affidavit to ground the renewal made, the order was irregular; and the question now is, whether the decree of 1854, unappealed from and unreversed, and even paid by the plaintiff, is, notwithstanding the facts stated in the replication, a bar to the present action?

Now, first, it is clear that the demurrer admits all the facts stated in the replication (*Stephen on Pleading*, p. 161, 1st ed.) What are those facts?—First, that the decree of 1854 was obtained without any of the defendants therein named being served with any process. Secondly, that one of the three defendants was residing in a different county at the time this decree was obtained; and thirdly, that the decree of 1854 was obtained by a fraud upon the Assistant-Barrister and upon the plaintiff.

It cannot now be disputed that the decree of 1854 was obtained without any service of process or notice to the defendants therein named. Notice of renewal there was given to the plaintiff, but that is not a notice to ground a new decree. But it is argued that the decree itself, stating that the defendants had been duly served, is conclusive on the parties to it, and cannot be controverted in any other Court. If this be law, then the Court of the Assistant Bar-

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

rister possesses a jurisdiction which no other Inferior Court in the empire possesses.

It is clear upon authority that, unless the Civil-bill Acts give this extensive power to the Barrister, he cannot have it by the Common or Statute Law of the realm. *Ferguson* v. *Mahon* (*a*) is a decisive authority upon this point.

In Mr. *Longfield's edition of Napier's Practice of the Civil-bill Courts*, p. 47, the learned editor applies the doctrine laid down by the Queen's Bench in England to the Civil-bill Courts in Ireland. He says, "If a decree be made without service of "process in such manner as the Acts direct, and without an appear-"ance by the defendant, it seems on all principle to be wholly "void, and that even trespass would lie against the plaintiff in the "decree." I can see nothing in the Civil-bill Act to preclude a party not served with process from asserting that, in consequence of that non-service, the Barrister had not jurisdiction to make the decree. The 14 & 15 *Vic.*, c. 57, s. 65, and the following sections, provide that the process shall be served, and provide also for the mode of service; but the argument of the defendant is, that merely by reciting a service of process in the decree, the Barristers acquire a jurisdiction to decree against absent parties, without any service. This doctrine appears to me to be pregnant with dangerous consequences both to property and liberty; and unless an action in a Superior Court be open to the injured parties, they are utterly remediless. It has been argued that the party under such circumstances would have an appeal to the Assizes. Now supposing that such an appeal did lie, the remedy would be a most insufficient and unsatisfactory one. It suggests an appeal after execution executed, after incarceration of the body or sale of the parties goods—such would indeed be a most inadequate compensation. But, in my opinion, no appeal is open to parties who have been decreed, without any service upon them; no such appeal is contemplated by the statute; the provisions for appeal are all made for persons who have been served with process; and accordingly, the appeal must always be to the next going Judges of Assizes after the decree pronounced. The 133rd section of the statute is relied on, to show

(*a*) 11 Ad. & Ell. 179.

that an action is taken away from the party so aggrieved; but that section works no such wrong; reading its terms altogether, it only provides that (save by appeal) the decree shall not be removable or examinable by way of error in any Court. But again, the replication states that one of the three defendants was outside the jurisdiction when the decree of 1854 was made: as to him, the decree is admittedly void; and I ask can it be good against the other parties? Can this joint decree be partly void and partly valid? I think not. There are special provisions in the Act for the case in which some of the defendants are within and some are outside the jurisdiction. But this decree of 1854 is not founded on those provisions, in such cases the decree can be only against the parties within the jurisdiction. I think, therefore, that the Barrister had not jurisdiction to pronounce the decree relied upon in the defendant's plea. But secondly, this decree of 1854 was obtained by fraud practised upon the Barrister and on the plaintiff; the word fraud is not used, but the fact alleged imputes a fraud. The replication states that the defendant, by his attorney, instead of taking out a renewal (as ordered by the Court), of the original decree of 1849, "caused and procured an original civil-bill decree "to be signed by the Assistant-Barrister and by the Clerk of the "Peace and by the attorney in said Court, in the words and figures "following," setting out the decree.

Now that this was a fraud upon the plaintiff, and such a fraud by the defendant as nullifies his decree, I cannot doubt. *Per fraudem* may be pleaded to a judgment in the Superior Courts, or replied, and if so, to a decree in the Barrister's Court: *Duncan* v. *Thomas* (*a*); *Pease* v. *Naylor* (*b*); *Jones* v. *Roberts* (*c*).

But it was said there was no averment of the identity of the decree, stated in the replication, with that stated in the plea. That objection might possibly avail upon a special demurrer, but I think it does not hold upon this general demurrer.

We are here called on to pronounce that two decrees for the same amount, and between the plaintiff and the same three

(*a*) 1 Doug. 196. (*b*) 5 T. R. 80.
(*c*) 2 Cr. & M. 219.

E. T. 1857.
*Queen's Bench*
GOVERN
*v.*
ROWLAND.

defendants, were pronounced on the same day at the same Sessions; the only difference being that the debt in one is stated to be on foot of a W. O. U., and the other on an account stated—in substance the same debt; but any ambiguity is removed by looking to other allegations in the replication: for it is averred that the defendants were not served with any process in respect of the £20 mentioned in the plea, otherwise than and except the notice of renewal; and that no original decree bearing date the 11th of October 1854 was made as stated in the renewal. I think, of the identity of the decrees there can be no reasonable doubt.

I am, therefore, satisfied that the decree of 1854, mentioned in the replication, is the same as that stated in the plea, and that that decree was obtained without service on the defendants, and when one of them was out of the jurisdiction, and that it was obtained by fraud (though the word fraud is not mentioned, the act of substitution is a fraud); and I, therefore, think the replication good, and that the demurrer should be overruled.

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THE QUEEN, at the prosecution of
The Very Rev. JOHN CATHER, Archdeacon of Tuam,
*v.*
THE JUSTICES OF THE PEACE OF THE COUNTY OF MAYO.*

T. T. 1857.
*May* 28, 29.
*June* 10.

The average price of corn, for a period of seven years, ending 1st November 1821, was stated in a certificate under the Tithe Composition Act (4 *G.* 4, c. 99), and dated the 11th of October 1828, to be 15s. 2d.

*Held* (CRAMPTON, J., *dissentiente*), that although, *prima facie*, the 15s. 2d. must be presumed to be British currency, yet the Justices at Quarter Sessions, upon an application to alter the averages, pursuant to the Tithe Rentcharge Acts, were bound to receive evidence that the 15s. 2d. was intended to represent late Irish currency.

THIS case came before the Court on a return to a writ of *certiorari*, which issued in Hilary Term 1857. The return stated that an

* PERRIN, J., *absente*.

application in writing was made by the Marquis of Sligo, the Earl of Lucan, and J. W. Garvey, Esq., to Michael O'Shaughnessy, Esq., the Assistant-Barrister, and Justices of the Peace for the county Mayo, assembled at Quarter Sessions at Belmullet, in the said county, on the 9th of October 1856, for the purpose of having the average price of oats for seven years preceding inquired of and ascertained, in order that the composition for tithes in the parish of Kilgeever in the said county, as ascertained by the certificate of composition for said parish, might be varied and diminished for the ensuing seven years, in proportion to said average price, and the appletment thereof diminished and amended accordingly, and the rentcharges payable in lieu thereof diminished in like proportion, pursuant to the statutes, &c. That the application was duly signed, and notices posted pursuant to the statutes, &c. That on the 10th of October 1856, the Assistant-Barrister and Justices entered into the consideration of the application. That the following certificate of composition was given in evidence, extracted from the registry of the diocese of Tuam:—"We, Rev. James Walker and Alexander "Clendinning, Commissioners duly appointed and sworn under and "by virtue of an Act made in the fourth year of the reign of King "George the Fourth, entitled 'An Act to provide for the establish-"ing of Compositions for Tithes in Ireland, for a limited time,' to "ascertain and fix a true and just composition for all tithes arising, "growing, yielded or payable within the parish of Kilgeever in "the county of Mayo, do hereby certify that the true and just "amount of composition for all tithes whatever within the said "parish is £240 sterling by the year, of which sum of £240 sterling, "£180 are due and payable to the Venerable Archdeacon Grace, as "a composition for the tithes claimed by him as vicar of said "parish; the sum of £45 sterling is due and payable to the "Venerable Archdeacon Warburton, as owner of the rectorial tithes "of said parish, and the sum of £15 is due and payable to the "Rev. James Dunne, as owner of the prebendal tithes of the pre-"bendary of Killabegs within said parish. And we further certify "that the average price of oats (being the corn principally grown in "such county) for the period of seven years ending on the 1st day

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF MAYO.

"of November 1821, is 15s. 2d.—Dated this 11th day of October "1828.—Signed," &c.

That the said Assistant-Barrister and Justices, on the same day, appointed Neal Davis to be an arbitrator, to ascertain from the *Dublin Gazette* the average price of oats as aforesaid, and to set forth such average price by his report in writing, to be delivered to the Justices at the Quarter Sessions to be held at Westport, on the 27th of October 1856. That the said arbitrator did accordingly deliver his report to the Justices at Westport, which, after reciting his appointment as contractor, proceeded as follows:—"I, the said "Neal Davis, in pursuance of such nomination and appointment, "and of the several statutes in that case made and provided, having "carefully examined the averages in the *Dublin Gazette*, do find "the sum of 12s. 8¼d., according thereto, to be the average price "of a barrel of fourteen stone of good marketable oats, on an "average of the seven years next preceding the 9th day of October "1856. Given under my hand," &c.

That, it appearing to the said Justices that the said sum of 12s. 8¼d., as ascertained by the said Neal Davis, was less by one tenth at least than the said average price of 15s. 2d. set forth in the said original certificate of composition, and being about to make an order on said application, it was objected by Counsel for the said Archdeacon of Tuam, that the said sum of 15s. 2d., in said certificate of composition, was not British currency, and should be read as 15s. 2d. late Irish currency, notwithstanding the said certificate of composition was dated the 11th of October 1828; and Counsel proposed to examine Robert Henry to prove that he had examined the *Dublin Gazette* for the seven years ending the 1st of November 1821, and that the said average price of 15s. 2d. was late Irish currency; but that the said Robert Henry did not offer to produce to the Court the said *Dublin Gazette;* whereupon it was objected by Counsel for the applicants that no evidence could be received to vary or contradict the said certificate, which was of record; that the amount of composition in such certificate had always been claimed by the said Archdeacon of Tuam as British currency, and always paid as such, and that one portion of the certificate could not be

read as British, and the remainder as late Irish currency. That the Justices declined to receive the evidence of the said Robert Henry; and no other objection having been made, or evidence tendered, the said Justices made an order set out in the return, the effect of which was, that the rentcharge in lieu of composition for tithes in the said parish of Kilgeever, for the seven years commencing the 1st of November 1856, was reduced to the sum of £200. 15s. 4¼d. per-year, being the like proportion to the amount set forth in the original certificate as 12s. 8d. bears to 15s. 2d.

An affidavit had been made in support of the application for the writ of *certiorari*, that the average price of oats for the seven years previous to 1821, calculated from the *Dublin Gazette*, was 15s. 2d. late Irish currency.

*Napier* (with him *A. Hickey*), for the Archdeacon of Tuam.

The question is, whether the 15s. 2d. in the certificate is British or late Irish currency? It is admitted that the certificate was given after the change of currency; but the Currency Act does not apply where the intention of the parties was that the sum should be stated in the former currency: 6 *G.* 4, c. 79; and it is not disputed that, at the date of the certificate, the average price of oats was, according to the *Dublin Gazette*, 15s. 2d. late currency. The Commissioners were appointed under 4 *G.* 4, c. 99, s. 16, and the form of certificate (which is dated 1828) is prescribed by section 25. The sum stated in the body of the certificate was the sum thenceforward to be paid, and is necessarily present currency; but the sum stated in the end of the certificate is an average from the *Dublin Gazette* of prices in the former currency, and therefore it must be presumed that the average is given in the same currency: *Lanoaze* v. *Cathrew* (*a*); *Lansdowne* v. *Lansdowne* (*b*); *Holmes* v. *Holmes* (*c*). This is apparent even on the face of the certificate, the amount of the composition being stated as "sterling," which must be taken to be British currency: *Lord Ormonde* v. *Cope* (*d*); but the word "sterling" is omitted in stating the average price of corn. The

(*a*) Batty, 733.
(*b*) 2 Bligh, H. of Lords, 60.
(*c*) 1 Russ. & Myl. 660.
(*d*) 3 Law Rec. 88, 111.

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF
MAYO.

price of corn is not an essential part of the certificate: by the 4 *G.* 4, c. 99, s. 25, the Commissioners are to "subjoin the average to the certificate," but this is only directory, and therefore the Rentcharge Act, 1 & 2 *Vic.*, c. 109, s. 32, provides that when the average "shall "not be stated in any such certificate, the Justices shall ascertain "from the *Dublin Gazette* the average price of corn for the period "of years with reference whereto such composition may have been "calculated." The certificate then consists of two parts, of which the first part is a matter of record, conclusively ascertaining the amount of composition to be paid for tithes: 4 *G.* 4, c. 99, s. 31; the other part is not a matter of record, but is supplementary, and its total omission will not invalidate the certificate. It is in the nature of a memorandum of a calculation "that the average price *is*" a certain sum per barrel: 4 *G.* 4, c. 99, sched. B. This calculation may be erroneous or ambiguous, and the Court, having the same documents to refer to, from which the Commissioners made the calculation, and therefore being able to correct the error or explain the ambiguity by reference to them, will not allow an error or ambiguity to prejudice the parties. In the present case, the average price may be 15s. 2d. Irish currency, and the original documents, from which that average is deduced, show that the elements of calculation were in Irish currency; therefore the maxim *id certum est quod certum reddi potest* applies to this case, otherwise the Court is called upon to stereotype a falsehood. Extrinsic evidence is admissible to explain the ambiguity: *Sweet* v. *Lee* (*a*); *Spicer* v. *Cooper* (*b*); *Taylor on Ev.*, 2nd ed., section 34.

*Brewster* (with him *R. Deasy* and *Buchanan*), for the Justices.

The argument that the average price of corn is stated in a currency different from that in which the amount of composition is stated is fallacious, because the amount of composition was calculated with respect to the amount of tithe paid during the seven years preceding 1828, when the Irish currency was in force; so that both sums are calculated according to the currency formerly used in Ireland. The certificate is conclusive.—[MOORE, J. You

(*a*) 8 M. & Gr. 452. (*b*) 1 Q. B. 424.

must contend that it is conclusive as to the average price.—CRAMPTON, J. And that it is an integral part of the certificate.]—By 4 *G.* 4, c. 99, s. 25, the whole certificate must be read as one document. The Commissioners have so signed the certificate; the average price is part of, and not merely added to, the certificate as a memorandum or indorsement, and the certificate is a record: *Crowley* v. *Flood* (*a*). As to the word "sterling," it is only used in the certificate in reference to the whole amount of the composition, "£240 sterling," while, in distinguishing the parts of that sum payable to the several parties named, the word "sterling" is omitted; therefore its omission after the average price of corn proves nothing. The certificate can only be altered by appeal, as provided by 4 *G.* 4, c. 99, s. 29. The duty of the Commissioners was two-fold in regard to the certificate; firstly, to ascertain and state the amount of composition; and secondly, to state the average price of corn; and both calculations were made from similar materials. The certificate is dated after the change of currency, and was to be used for the future, whenever the composition was to be varied; and it is only when the average price of corn is omitted from the certificate, that the Justices, on hearing the application to vary the composition, can refer to *The Gazette* itself: 1 & 2 *Vic.*, c. 109, s. 32.—[LEFROY, C. J. Then it might happen that, in two parishes, although the price of the corn were actually the same, the prices from which the amount of composition is to be calculated might be different.]—Yes. As to the words in the Currency Act, "that all such receipts, &c., shall be held to be made according "to the currency of Great Britain, unless the contrary be proved "to have been the intention of the parties concerned," 6 *G.* 4, c. 79, s. 1, no evidence was tendered as to the intention of the Commissioners, but only of the incorrectness of the calculation, and that was properly refused.—[LEFROY, C. J. I cannot distinguish this from the ordinary cases of latent ambiguity.]

*Napier* replied.

*Cur. ad. vult.*

(*a*) O'Leary on Tithe Rentcharge, 305, *n*.

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF
MAYO.

MOORE, J.

This case comes before the Court upon the return made to a writ of *certiorari*, obtained by the Rev. John Cather, Archdeacon of Tuam, and directed to the Justices of the Peace of the county of Mayo. The facts of the case are all set out in the return and it appears that the *data* which the Justices had before them when about to adjudicate upon the case, were, £240, the total amount payable according to the old average, and 15s. 2d., the price of corn per barrel in the certificate; which latter they decided to mean 15s. 2d. British. They had also the report of the arbitrator, ascertaining the average price of oats for the seven years preceding October 1856, to be 12s. 8¼d. per barrel. Upon this state of facts, the Justices reduced the composition to £200. 15s. 4d. Now, supposing these *data* to be correct, the decision of the Justices is unobjectionable; but this *certiorari* was granted upon the supposition that the Justices should not have decided that the 15s. 2d. mentioned in the certificate was British currency, or, at least, should not have so decided without hearing the evidence proposed to be given, that the 15s. 2d. was intended by the Commissioners to be understood as late Irish currency. In my opinion, the Justices erred in rejecting this evidence. It is true that the certificate was made in 1828, two years after the English currency had been established as the legal currency in this country; but still the 15s. 2d. is stated to be the result of the averages taken from *The Gazette* for a period ending in 1821, which was five years antecedent to the change of currency: and considering that the documents, from which it was the duty of the Commissioners to ascertain the averages, contained nothing but Irish currency, I am not clear that, upon the face of the certificate itself, the 15s. 2d. might not be considered to be late Irish currency; but, at all events, it was a question of ambiguity, and therefore the evidence was admissible. It appears to me that the Currency Act provides for the admission of this evidence, because, after providing that for the future everything is to be taken to be in British currency, it provides expressly, "unless the contrary be proved to have been the intention of the parties concerned." I do not think that this clause extends merely to

contracts between party and party, because it mentions "all "transactions, dealings, matters and things whatsoever, relating "to money," &c. Now when we find the Commissioners, whose duty it was to ascertain the average price of corn for seven years ending in 1821, setting out 15s. 2d. in their certificate, without specifying the currency, it appears to me that it was competent for the Justices to have received evidence to prove in what currency it was stated. Now the Justices refused to entertain that evidence, and therefore, having pronounced an order founded upon erroneous *data*, I am of opinion that that order should be quashed.

CRAMPTON, J.

In this case, I differ from my Brother MOORE. I think that this case ought to be decided in favour of the appellants. In the first place, I think that on this certificate the currency must be taken to be British currency; and secondly, I am of opinion that the Magistrates exercised the jurisdiction vested in them rightly, and that over that jurisdiction we have no control. By the 4 *G.* 4, c. 99, s. 57, this *certiorari* is taken away, and this Court has no jurisdiction to grant a *certiorari*, except in cases in which the Magistrates have acted without or in excess of jurisdiction. Now in this case, the Magistrates had full and exclusive power over this matter, and, in the exercise of that power, they have not exceeded their jurisdiction; all their proceedings have been regular, and, if they have made a mistake, that can make no difference, this not being an appeal from that decision, but a complaint that the Magistrates have exceeded their jurisdiction. Further, this certificate must be taken to mean English currency. It states that the entire amount of the composition is £240, and it finds the average as 15s. 2d. Now we are called on to impeach this order of the Magistrates, and to find that the sum mentioned in the first part of this certificate is British currency, and the latter part is Irish currency. Neither the words English or Irish currency are mentioned in this certificate; and it does appear a strange thing to say that we are

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF MAYO.

to read the first sum as giving the parson his stipend in British currency, and in the latter sum that Irish currency is intended. Further, upon this statute I do not think that it is in the power of anyone to read this as Irish currency. By 6 *G.* 4, c. 79, the currency was changed. This certificate bears date two years after the passing of that Act, and, *prima facie*, the sums therein named must be taken to be in British currency; but the reason assigned why we are to take the latter sum to mean Irish currency is this, that because the sums stated in *The Gazette*, upon which this average was struck, were stated in Irish currency, therefore it was natural to suppose that the Commissioners stated the averages in Irish currency also, as the materials on which they found them were stated in that currency. That is a fallacious argument; for the same reason that would apply to the averages would equally apply to the stipend, which is founded upon payments made in Irish currency. The Currency Act says, "All such receipts and payments, gifts, grants, &c., shall be "taken to be in British currency, unless the contrary be proved "to have been the intention of the parties concerned." That section plainly relates to transactions in which there were parties contracting with each other. In all such cases, if it be proved that the meaning of the parties was to contract in Irish currency, then the sum was to be so read. The case of *Lansdowne* v. *Lansdowne*, that has been relied on, was a case between party and party; but who are the parties in this transaction? None. This is a certificate of a public officer. The 3rd section of the Act 6 *G* 4, c. 79, applies to matters of a public nature, and these are all to be taken as British currency. The 10th section may apply to this particular case; it is a public document, and there is no saving in this section to show that the intention of the parties was different from what was there stated. If the saving had applied to the other sections, it might have been otherwise; but it is confined to the 1st section, and has no application to such a case as the present.

Upon these grounds, I am of opinion that this order of the Magistrates cannot be interfered with. I think the Magistrates were right in refusing to have this written instrument the subject

of contradiction or explanation; I think there was no ambiguity, and no reason for admitting the evidence.

LEFROY, C. J.

In this case I differ altogether from my Brother CRAMPTON, with respect to the legality of this order. It appears to me that the conduct of the Magistrates was illegal. I apprehend, even if it were now open to us to consider whether the *certiorari* would lie, that it is quite evident that a *certiorari* lies whenever Magistrates exceed their jurisdiction. In this case their jurisdiction was not an unlimited jurisdiction to settle the averages as they might think fit, but to settle them in a prescribed mode, namely, by comparing the price of a barrel of oats in the year 1821, as stated in the *Dublin Gazette*, with the average price of a barrel of oats at the time the application was made to them. They had no right to take any other test; they were tied up to that mode of ascertaining the averages, and the moment they adopted another mode, they exceeded their jurisdiction, and it was then the duty of this Court to interfere and relieve the party. With respect, therefore, to the right of the Court to grant the *certiorari*, there could be no objection.

The Magistrates imported to proceed according to the provisions of the Act, and they appointed an arbitrator. The proper course was to take the average price of oats in 1821, and to reduce it from Irish to British currency, and to compare it with the average price in British currency at the time when the new averages were to be struck. The certificate signed in 1828 gave 15s. 2d. as the average value in 1821; it did not describe that as Irish or British currency, but simply stated that the average price of a barrel in 1821 was 15s. 2d. If taken as it actually stood in *The Gazette*, it must have been Irish currency, for that was before the change of currency; but in legal presumption, judging only by this document, they were entitled to take it as meaning British currency, because the document was signed after the change of currency. But although *prima facie* that might be so, the Act which changed the currency provided for the very ambiguity which the Legislature foresaw as likely to occur, namely, that parties, after the passing of

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF MAYO.

that Act, might express themselves in a way that must be considered legally as importing British currency, although Irish was really meant. The Legislature, therefore, provided that parties were to be at liberty to show that Irish currency was meant, and then to rebut the *prima facie* presumption of law.

But it has been said that this was only a provision between individuals—why should it not apply to a public duty to be discharged *inter partes?* Were not the parish and the clergymen parties, between whom they were bound to administer the law according to the provisions of the Act? And when they were apprised that the very sum stated as the average prior to 1821 was taken from *The Gazette* of 1821, when there was no such thing as British currency, and they persevered in holding that it was British currency, they were violating their duty, not acting according to the provisions of the Act. When this is the case, it is our duty to interpose, and take care that they keep within proper bounds.

*Hickey* applied for costs.

LEFROY, C. J.

This was a mistake in point of law, and we cannot give costs.

Order of the Justices quashed.

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THE QUEEN, at the prosecution of the Rev. JAMES GOLLOCK, the Rev. W. NEWMAN, and the Vicars-choral of Cork,

*v.*

E. T. 1857.
*April* 16.

THE JUSTICES OF THE PEACE for the county of Cork.

Upon an application to the Court of Quarter Sessions, for the reduction of tithe-rentcharge, S. F., a Magistrate, who was himself one of the tithe rentcharge payers, was present upon the Bench for a considerable time during the hearing of the application.—*Held*, that the Court of Quarter Sessions was improperly constituted, and a *certiorari* was granted to remove the proceedings.

IN this case a conditional order had been obtained on behalf of the prosecutors, that a *certiorari* do issue, to bring into this Court

an order made by the defendants, as Justices of the Peace, at the Quarter Sessions, for the purpose of having said order quashed.

It appeared that upon the 20th of May 1856, an application was made to the Justices of the Peace for the county of Cork, assembled at the Quarter Sessions holden at Macroom, in the West Riding of the said county, for the purpose of altering the tithe rentcharge in the parish of Desertserges, pursuant to the several Acts relating to the tithe composition and tithe rentcharge in Ireland. The notice of application was signed by five tithe rentcharge payers in the said parish, and, amongst them, by Sampson T. W. French, who was also a Justice of the Peace for the county of Cork, and resided in the East Riding of the said county. At the Quarter Sessions, Sampson T. W. French took his seat upon the Bench, and acted as a Magistrate, in considering and disposing of the applications for spirit licenses, and some other business. The applications for the reduction of the tithe rentcharge of the parishes of Kilmeen and Desertserges were then called on, and upon the hearing of the application with respect to the parish of Kilmeen (which was first heard, and in which Mr. French was not a tithe rentcharge payer), Mr. French sat upon the Bench as a Magistrate, next to and on the right hand of the Assistant-Barrister, and took part in the adjudication of said application, by which adjudication the tithe rentcharge of the parish of Kilmeen was considerably reduced. The case of the parish of Desertserges was then proceeded with, Mr. French continuing to sit upon the Bench in the seat which he had previously occupied, and was examined from the Bench to prove his signature to the notice of the application; and, notwithstanding the remonstrance of the Counsel for the rectors and vicar of the said parish, continued to sit amongst the Magistrates, stating, however, that he did not intend to take part in the proceedings. Before the conclusion of the case, Mr. French retired from the Court, and did not again return; and an order was eventually made by the Justices, appointing an arbitrator to ascertain the average price per barrel of wheat for seven years next preceding the 1st of November 1821; the Justices having decided that wheat was the description of corn

E. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF CORK.

principally grown in the county during the period with reference to which the original composition was calculated; and the said Sessions were adjourned to the Sessions of Clonakilty, where, on the 10th of June 1856—Mr. French not being then present—the Justices, having received the report of the arbitrator, made an order reducing the tithe rentcharge of the parish of Desertserges accordingly.

It appeared, by the affidavit of Mr. French, that he was advised that his attendance at the Quarter Sessions at Macroom was necessary for the purpose of proving his signature to the notices: that he took his seat upon the Bench, because he was suffering from a severe injury, in consequence of which he walked, and even stood, with pain, and which rendered it dangerous for him to remain in the crowded part of the Court; and that, with the exception of his answers to the questions put to him while under examination as a witness, he did not directly or indirectly take part or interfere as a Magistrate or otherwise in the application concerning the parish of Desertserges.

*Exham* having, on a previous day, obtained a conditional order—

*Macdonogh* (with him *Deasy* and *H. J. Leslie*) now showed cause, and cited *The Queen* v. *The Justices of London* (*a*); *The Queen* v. *The Justices of Hertfordshire* (*b*); *Regina* v. *The Justices of Surrey* (*c*).

*J. Clarke* (with him *Exham*), contra.

LEFROY, C. J.

In this case we granted a conditional order, that a writ of *certiorari* should issue to bring up an order made by certain Justices of the Peace for the county of Cork, on the grounds that Mr. French, one of the Magistrates who attended at the Sessions when

(*a*) 18 Q. B. 421, *n*. (*b*) 6 Q. B. 753.
(*c*) 1 Jur., N. S., 1138.

that order was made, either took part in the proceedings, or in the decision, he being at the time interested in the subject-matter. To say that he took part in the decision is out of the question, as he was not present at it; but if he took part in the proceedings as a Magistrate, it is impossible to say how far his taking such part might or might not have finally influenced the decision.

The question therefore is, did Mr. French really take part in the proceedings as a Magistrate? What are the facts? Two cases were brought before the Magistrates for their consideration; one respecting the parish of Desertserges, in which Mr. French was a tithe-payer; and the other respecting the parish of Kilmeen, in which Mr. French appears not to have had any direct interest. It appears that down to the point of those cases being called on for decision, Mr. French acted magisterially. The first question that arose in reference to them was, whether the case in which Mr. French was interested should take precedence over the other? In that he took part, deciding that it should not have precedence. Now it is impossible to say how far the decision of this preliminary point may have affected the ultimate decision; but further, he remained on the Bench during the entire time the case of the parish of Kilmeen was before the Court. In the case of Desertserges he was examined as a witness, during which time he remained on the Bench, and also during part of the time that other witnesses were examined. He so remained on the Bench without disclaiming or giving notice that he would take no part, thereby presumably taking part in the case.

Some conversation appears to have taken place between him and the chairman. I do not lay a stress upon this, as saying that this conversation was about the subject-matter, but I merely advert to it in reference to the effect it must have had on the public, and the suspicion likely to be created thereby; they had a right to see that the case was adjudicated on without anything that reasonably or fairly might excite suspicion.

Under these circumstances, we cannot say the case is wholly free from objection, and we feel we ought to grant this *certiorari*, in order to bring the matter before us in a more distinct form.

T. 1857.
en's Bench
E QUEEN
v.
TICES OF
CORK.

CRAMPTON, J.

I concur with my LORD CHIEF JUSTICE. The same principle which rules this case was laid down in the *The Queen* v. *Massy and others* (*a*). In that case, Sir H. D. Massy took no actual part in the proceedings; yet appearing to have an interest (however minute), and appearing to the public eye as one of the acting Justices, the Court thought they were bound to grant a *certiorari*. We did not mean to impeach the motives of Sir Hugh Massy; but we thought his conduct, especially his remaining with the other Magistrates after they had retired from the Court for the purpose of deliberation, was calculated to cast doubt and suspicion on the decision of the Bench. The *certiorari* was granted, not for the purpose of inquiry into the motives of the Magistrate, but in order to guard the administration of justice from even the suspicion of partiality. Generally, I should say that, when a Magistrate takes his seat on the Bench, although he may state that he will take no part in the proceedings, yet he is virtually a party to them; and I would add that when a Magistrate has an interest in a case, his discreet and proper course would be to abstain from sitting with the other Justices upon the Bench, but emphatically so if his right so to sit be questioned by one of the parties. In the present case, I cannot avoid saying that in the eye of the public it would appear that the Magistrates were in some degree influenced by Mr. French's presence amongst them. He came a long distance to attend these Sessions, at which he was not in the habit of attending. He stated he came as a witness, but such was not the character of his interference, in the eyes of the public. He took part as a Magistrate in the granting of licences, and also in the other proceedings of the Court, and the question arises, when did he cease to act as a Magistrate? Two very important questions were to be tried, involving the same subject-matter, and the decision of one case was likely to influence, nay, perhaps to determine, the decision of the other; therefore his taking part in the one was indirectly taking part in the other. I therefore cannot divest my mind of the idea that the public may have thought he came specially for the purpose of deciding these questions. The Magistrates should not only act

fairly and impartially, but should also let the public see that they are so doing. I therefore am of opinion that this order ought to be made absolute.

PERRIN and MOORE, JJ., concurred.

Order absolute.

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*May* 8.

An order of the Magistrates in Quarter Sessions, for varying the amount of the tithe rentcharge of a parish, pursuant to the 4 *G.* 4, c. 99, s. 43, and 1 & 2 *Vic.*, c. 109, s. 32, having been quashed on the return to a *certiorari*, after the 1st of November, in the seventh year during which such variation should be made: upon an application for a mandamus, to direct the Magistrates to enter continuances of the proceedings prior to the order which was quashed, and to adjudicate thereon—*Held, per* LEFROY, C. J., and PERRIN, J., the statute having provided that such variation should be made between the 1st of May and the 1st of November in every seventh year, from the expiration of the time limited by the certificate of composition, that the Magistrates had no jurisdiction to proceed after that period; but—

*Per* CRAMPTON and MOORE, JJ., that a mandamus should be granted.

An application was now made on behalf of the prosecutors to quash so much of the proceedings mentioned in the return to the writ of *certiorari*, as consisted of the said adjudications of the Justices, of the 20th of May, and 10th of June 1856, respectively: and on behalf of the said tithe rentcharge payers of the parish of Desertserges, not including Mr. French, who had been the applicant for valuation. An application was also made that the petition referred to in the said adjudications should be remitted to the Quarter Sessions, and that an order in the nature of a mandamus should issue to the Justices of the Peace for the county of Cork, directing them to enter, or cause to be entered, continuances on the record of the Court of Quarter Sessions, of the proceedings previous to the adjudication of the 20th of May 1856, and to hear and adjudicate thereon, upon the ground that the adjudication being quashed for want of jurisdiction in the Court, during the sitting on the Bench of an interested Magistrate, no valid adjudication had been made by the Justices.

T. T. 1857.
*Queen's Bench*

THE QUEEN
*v.*
JUSTICES OF CORK.

*Exham*, for the prosecutors.

*Macdonogh* (with him (*H. J. Leslie*), for the tithe rent-charge payers.

CRAMPTON, J.*

This is a question of great importance, and ought not to be disposed of in a summary way. I think the best course is to quash the order of the Justices, and to grant a conditional order for a mandamus, in the terms of the motion on behalf of the tithe rentcharge payers, in order that the question may be decided before the Full Court.

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T. T. 1857.
*May* 25, 26.

*J. Clarke* (with him *Exham*) now showed cause.

This Court cannot order the Magistrates to re-consider the matter; the period limited by statute for that purpose has expired, and nothing further can be done for the next seven years. The certificate of composition is dated the 28th of August, and the composition is, therefore, subject only to a septennial variation: 5 *G.* 4, c. 63, s. 23. Had the certificate been made prior to that Act, the composition would have been triennially variable. Stanley's Act, 2 & 3 *W.* 4, c. 119, s. 6, and the Tithe Rentcharge Act, 1 & 2 *Vic.*, c. 109, s. 32, adopt the principle of the 5 *G.* 4, c. 63, subjecting the composition to a septennial variation. The mode of proceeding in order to procure the variation is prescribed by the 4 *G.* 4, c. 99, s. 5; but the period within which the variation must be effected is limited to the interval between the 1st of May and the 1st of November in the prescribed year. In the present case, the variation was a septennial one, and proceedings were duly instituted for the purpose of effecting the variation of the tithe rentcharge, but they proved abortive. The 1st of November 1856 (which is the extreme limit in this instance) has passed by; and the question is, have the Magistrates the power to alter the amount of the tithe rentcharge at a period different from that prescribed by statute

* *Solus.*

or can this Court enable them to make an order *nunc pro tunc?* We admit that the Quarter Sessions have a power to adjourn from time to time; but that cannot be done where a particular period is limited by statute.—[LEFROY, C. J. This matter is not within the ordinary jurisdiction of the Court of Quarter Sessions; it is an extraordinary jurisdiction with which that Court is invested.]—And therefore it must be strictly followed: *The King* v. *Conservators of the River Tone* (*a*); *Bowman* v. *Blyth* (*b*).—[MOORE, J. Supposing they had power to adjourn, they have not done so.]—If the Sessions can be adjourned from time to time, when are the seven years to expire?—[MOORE, J. Might not an order be made to take effect from the 1st of November 1856?]—What, in that case, is to be done with reference to the rentcharge which may have accrued due in the interval? It is payable half-yearly; and at what rate is it to be calculated if the adjournment passes over the gale day?

*Macdonogh* (with him *H. J. Leslie*), contra.

The argument on the other side is, that where the rentcharge payer has complied with all the requirements of the statute, without default on his part, he is to be deprived of all remedy if this Court quashes the order of the Quarter Sessions, because, in a Bench composed of several Magistrates, over whom he had no control, there happened to be one who was interested in the case. The rentcharge payers in the present case proceeded with all diligence; the preliminary notices were published on the 2nd of May, and then a petition having been presented, an arbitrator was appointed on the 20th of May to take the averages; the Sessions are then adjourned until the 14th of July, and then, when Mr. French was not present, the final order is duly made, reducing the rentcharge. The prosecutors allow the 1st of November, which they allege to be the extreme limit for varying the rentcharge, to pass; they lie by until the 23rd of November, when they obtain their conditional order for a *certiorari*, and, eventually, procure the

(*a*) 8 T. R. 286.

(*b*) 26 L. J., M. C., 57; S. C., 3 Jur., N. S., 359; and on appeal, Exch. Cham., ib. 886.

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF CORK.

Magistrates' adjudication to be quashed; and is it to be said that, by their delay, we are to be deprived of our right? If the Magistrates discharge their duty, the suitor is without remedy; and that is the effect of the decision in the case of *The King* v. *Conservators of the River Tone;* in which it was held that where certain accounts were to be examined annually by the Quarter Sessions, and the accounts for one year had been settled, the Magistrates examining the accounts for the ensuing year were bound to presume the accounts of the previous year to be correct, and could not re-open them. But in the present case, the Magistrates have not discharged their duty, and the suitor is not to be punished upon that account. The case of *Bowman* v. *Blyth* is distinguishable, because there a particular act was to be done at a specified Sessions; but here, the words in the 4 *G.* 4, c. 99, s. 43, are, "at such Session, or some adjournment thereof, or at such time as such Justices shall direct."—[MOORE, J. Suppose the arbitrator had died before making his report?—CRAMPTON, J. Or suppose the Justices had refused to act?]—In either case, according to the argument on the other side, if the 1st of November pass by, all power of altering the rentcharge is lost. But Courts of Quarter Sessions have power to adjourn matters properly before them: *The King* v. *Justices of Wilts* (*a*). If a Court is improperly constituted, its proceedings will be declared void: *per* Lord Denman, C. J., in *The Queen* v. *Cheltenham Commissioners* (*b*); *The King* v. *Inhabitants of Rishton* (*c*). The Court of Quarter Sessions is a continuing Court: *per* Coleridge, J., in *Keen* v. *The Queen* (*d*). The principle upon which continuances are ordered to be entered is laid down in *The King* v. *Inhabitants of Yarpole* (*e*); *The Queen* v. *Justices of Kent* (*f*). Justice is not to be defeated because the Magistrates have made a mistake: *per* Lord Campbell, C. J., in *Ex parte Blues* (*g*).

*H. J. Leslie*, on the same side.

The fatality in this case, if it be one, has not been caused by us.

(*a*) 13 East, 352.
(*b*) 1 Q. B 467.
(*c*) 1 Q. B. 479.
(*d*) 10 Q. B. 928, 934.
(*e*) 4 T. R. 71.
(*f*) 2 Q. B. 686.
(*g*) 24 Law Jour., M. C., 138, 140.

There is a clear distinction between the adjournment of a case and of the Sessions: Earle, J., draws this distinction in *Keen* v. *The Queen* (*a*). In *The King* v. *Justices of Kent* (*b*), the Justices were directed to do an act "at the next Sessions, or within six weeks after Easter;" and yet we find the Court of Queen's Bench, in Trinity Term, on the 2nd of July, granting a mandamus directing the Justices to act, because they had not exercised the jurisdiction. Unless there be negative words in a statute, the right of adjournment, which is inherent in the Quarter Sessions, is not taken away. In *Bowman* v. *Blyth* (*c*), the decision could not have been otherwise, because the power was limited "to the Justices then and there;" and so in the cases decided under the Poor-law and Lunatic Acts in England: 13 and 14 *Car.* 2, c. 12; 9 *G.* 4, c. 40, s. 46; 16 & 17 *Vic.*, c. 97, s. 108. But in addition to the power thus existing to adjourn the case, the 4 *G.* 4, c. 99, s. 43, expressly empowers an adjournment of the Sessions; and it cannot be argued that this power is limited to the purpose of receiving the report of an arbitrator. This point has frequently been discussed on the election of officers in Corporations: *Tapping on Mandamus*, p. 32. It is not material that the time named has expired: *The Queen* v. *Deptford Pier Co.* (*d*); 2 *Pratt on Poor-law*, pl., 951, 952; *The King* v. *The Justices of Leicestershire* (*e*).

*W. A. Exham*, in reply.

The period for effecting a variation of the tithe rentcharge is limited; when that limit is passed, the Court of Quarter Sessions is for this purpose *functus officio*: *O'Leary on Tithe-rentcharge*, pp. 116, 117. The negative words required by the argument on the other side, to deprive the Sessions of the power of adjournment, are contained in 4 *G.* 4, c. 99, s. 43, "but in no other or intermediate year." If then "every seventh year" is substituted for "every third year," the limit is therefore specifically fixed by negative words. —[LEFROY, C. J. The 43rd section directs the variation to be

(*a*) *Supra.*
(*b*) 14 East, 395.
(*c*) *Supra.*
(*d*) 8 Ad. & E. 911.
(*e*) 1 Maul. & S. 442.

T. T. 1857.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF CORK.

made "during the continuance of such composition;" that is, before it expires, which it does on the 1st of November.]—Yes.—[CRAMPTON, J. Suppose all the preliminaries have been duly complied with by the clergyman and parishioners, but owing to any circumstance a fatality has occurred, without their default, do you contend that that is without remedy, if the 1st of November of the seventh year has passed?]—Yes; it is a *casus omisus* in the Act. *Dickenson's Guide to Quarter Sessions*, pp. 70, 71.

*Cur. ad. vult.*

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LEFROY, C. J.

*June* 9.

In this case, a *certiorari* had been granted, to remove proceedings before the Court of Quarter Sessions for the county of Cork. These proceedings took place upon the application of certain inhabitants of the parish of Desertserges, to alter the averages, under the statute for regulating the income of the clergy. By the provisions of this Act, a right is given to the clergy, every seven years, to have new averages struck; and the enactment is clear that this proceeding must take place between the months of May and November, and that these new averages must be struck within those times, pending the former averages; and, if the new average be not struck within that time, the old average is to continue for the next seven years.

In the month of May 1856, a petition was presented to the Quarter Sessions under this Act, by certain parties (having the requisite qualification for that purpose), to alter the averages. Due notice had been served, as provided by the Act. This petition must be signed by parishioners to a certain amount. Mr. French was one of the petitioners, and signed the notice. At that Sessions, Mr. French took his seat, and voted as a Magistrate. The Sessions proceeded to do the first act pointed out by the statute, namely, to appoint an arbitrator; and on that occasion Mr. French sat on the Bench. I am justified by the evidence in saying he did not sit on the Bench with the concurrence of the applicants. The arbitrator so appointed made a report; and, in July following, an average was struck in accordance with this report. In Michaelmas Term, an application was made to issue a *certiorari*, with a view

to question the average so struck, upon the ground that the Court was improperly constituted, namely, that a party interested in the subject-matter sat upon the Bench, and voted as a Magistrate. Upon full consideration, we were of opinion, not acting on any ground of wilful or corrupt motive on the part of Mr. French, but on the ground that it was contrary to the principles of law that any man should sit as a Judge in his own case, that the proceedings should be set aside; and I have not heard any question raised as to the propriety of that decision.

At the conclusion of the case, we were called on to remit the case to the Magistrates to re-consider the case, and to begin the matter *de novo*, and strike a new average. The objections to such a course appear to me quite decisive. First, it would be to remit to the Justices what, under the words of the Act, they would have no jurisdiction to determine; what they are to do must be done between May and November, during the seven years; it would therefore be calling on them to act where they had no jurisdiction. As to entering continuances, this is not a matter under their general jurisdiction as Magistrates, but under a statutable authority authorising them to do the act, the directions of which are quite express upon that point. It would, therefore, in my judgment, be calling on them to do what they had no authority to do; and their not doing so can cause no failure of justice, as the Legislature have provided that in such a case the former averages shall continue. For these reasons, I am of opinion that we cannot remit those proceedings. I am not aware that what is now sought for could be done by mandamus; if any step were to be taken, the proper course would appear to me to be by a *procedendo;* but how a *procedendo* would enable them to get over the difficulty of the statute, or of the order setting aside the proceedings, I am at a loss to understand.

CRAMPTON, J.

This is a case of vast importance, involving as it does the interest of every parson and of every parish in Ireland. This question may arise every seven years, and it is of the greatest importance that such a question should not be disposed of on a summary motion.

T. T. 1857.
*Queen's Bench*

THE QUEEN
*v.*
JUSTICES OF
CORK.

The application here is for a mandamus to compel the Ma
to strike a new average for the next seven years. I th
Court was right in quashing the order made at Sessions, b
sions Court then being improperly constituted; and if the
tion had been made by Mr. French alone, I should not be disp
have the question reviewed for his peculiar purpose; but the
four other persons besides Mr. French concerned in this ma
I cannot see that they are to be prejudiced because Mr. F
unfortunately or improperly sat upon the Bench. I therefo
this is a fit case to be put upon the record. I am unwilling to
nounce, upon motion, from which no appeal lies, a decided
upon the construction of the statutes. I quite agree in the con
that the averages are to be taken every seven years; but the
not put an end to the other questions in the case. We set asi
order, not because it was a bad one, not because the order w
within the jurisdiction of the Magistrates, but because the tri
was improperly constituted. The right insisted to have the
rages taken was a parochial right, not an individual one; eith
parish or the parson might insist on a re-consideration of the
rages. Suppose the parson did apply—suppose he had done al
was necessary on his part, and the Magistrates, through mist
otherwise, rejected his case, is the right to be defeated by rea
such casualty or corruption? That would be a monstrous
tion, yet the refusal of this mandamus would lead to that conclu
There is one fact which, on the return, would appear to me to
a grave question, whether, under the circumstances, we ought
aside those proceedings? The Magistrates appointed an arbitra
the proceedings were then adjourned to the next Sessions, when
award was confirmed. At that second Sessions, this most impo
element was suppressed; perhaps I ought not to advert to it
but it has added to the gravity of this important proceeding. S
pose then the Magistrates refused to entertain the case, wo
petitioner to lose his right under the Act because he did not
within the legal *termini?* I think that would be a monstrous
clusion to arrive at. The rights are reciprocal. What re
would there be for a parson? He could not apply for a proceed

because there is nothing to proceed on; but he should apply to this Court for a mandamus to the Magistrates, to compel them to perform their duty. The parish or the parson is neither of them in default; they are deprived of their rights by a fatality, and that could only be remedied by a mandamus. I am not now deciding that a mandamus would be the proper remedy; but, if the authorities cited apply, it is the exclusive and proper remedy. One of the primary duties of the Queen's Bench is to keep inferior tribunals within their due bounds. When our interference by *certiorari* was asked for, we granted it, although the power of granting a *certiorari* was generally taken away by the statute; but we granted it upon this ground, that where there is a wrong or improper tribunal, there is in fact no tribunal. But it is said that the time is gone by, that the order cannot be made within the proper *termini:* that was not the fault of the applicant at the Sessions, but the fault of the party who now makes the application to this Court. Why did he lie by for a whole Term, and suppress from the Court what had been done at the subsequent Sessions?

I do not mean to express any opinion as to what the effect of the return would be; but I am of opinion that it is a proper case for a mandamus, for the purpose of having this question properly decided on the record.

PERRIN, J.

I concur with my LORD CHIEF JUSTICE. The petition in this case was preferred before the Justices at the May Sessions, at Macroom, by Mr. Sampson, Mr. French and others. The Justices made an order appointing an arbitrator, and amongst the Justices who presided upon that occasion was Mr. French. I do not more particularly advert to the peculiar circumstance of the Magistrate presiding being one of the petitioners, but I take the record as it stands. The petitioner is one of the Court by which the order was pronounced; and it is clear that a party in a cause cannot be a Judge in it also. The Court then adjourned to the next Sessions, when the arbitrator made his return, and the averages are altered

T. T. 1857.
*Queen's Bench*

THE QUEEN
*v.*
JUSTICES OF
CORK.

accordingly. A *certiorari* is granted, and, upon the return
the whole matter upon the record, the order of the
quashed; and now an application is made for a mandamus
the Justices to consider the case as if the circumstances
which this Court felt bound to annul the order had not
But for what purpose is the mandamus applied for? Upon
return to the *certiorari*, everything has been brought
Court upon which the parties can rely. I do not know
the practice, after a return to a *certiorari* has been made,
mandamus to review the question or to have it further
I consider that further delay would be very inconvenient,
haps injurious to the parties whose rights are in dispute.
the course which has been pursued was a proper and
and I do not see any object in granting a mandamus.

MOORE, J.

I regret to differ from my LORD CHIEF JUSTICE and my
PERRIN in this case. It is admitted upon all hands that
the parishioners were entitled to consider the amount of
rentcharge payable in the parish of Desertserges, and, if
to have it reduced; and accordingly, in May 1856, five
(who were duly qualified to do so) presented their petition
purpose to the Quarter Sessions, having previously
proper notices. It is admitted also that every step was
the proper time; that the arbitrator was appointed and
report, and that the final order of the Justices was duly
in the proper year, and before the 1st of November in
But, the 1st of November having passed, an application
for a *certiorari*, to bring up the order pronounced by the
trates, upon the ground that the order was made by an
constituted Court: the *certiorari* is granted, and, upon the
it appearing that one of the petitioners, who was also a
had sat upon the Bench during the hearing of the cause, this
acting upon a rule which cannot be disputed, held that the
of the Magistrates was one which could not be sustained,
order was therefore quashed. The result of this is that,

parties were regular in their application, yet, in consequence of the legal impropriety of one Magistrate, sitting upon the Bench while the case in which he was interested was under discussion, the other parties are to be deprived of their rights. That is a strong proposition, and I should regret that the state of the law is such that, in consequence of a circumstance over which the suitors had no control, their rights were to be utterly defeated. The decision of the Justices, then, having been quashed, the applicants below apply to this Court for a mandamus, and we are to decide what is to be done. Two important questions have been raised; upon the one hand, it is argued that the time has gone by, and that the Quarter Sessions does not now possess the power of entertaining any proceedings with a view to alter the tithe rentcharge of the parish of Desertserges; and it is also contended that this Court, whose duty it is to keep inferior tribunals within their proper bounds, has no authority to grant a mandamus in this case: the result is, that the right of the applicants is gone, and this Court cannot grant a mandamus, because the Quarter Sessions have no jurisdiction to act. That is a question of great importance; but it is contested on the other side, and able arguments have been addressed to us to show that that is not the meaning of the Act. I express no opinion upon this point, but I consider it a question of so much importance that it ought not to be decided upon a summary application. I think the proper course would be to grant the mandamus.

The other question to which I have adverted is this:—the application to review the tithe rentcharge having proved abortive, either by the mistake, corruption or neglect of some person in the Court of Quarter Sessions, are the parties to be left without any remedy? Upon this arises the question, whether this Court has not inherent jurisdiction to prevent the rights of the suitors being defeated? I think these matters should be properly raised upon the record; and for these reasons, with the greatest deference to the opinions of my Lord Chief Justice and my Brother Perrin, in addition to the grounds which have been so strongly put by my Brother Crampton, I am of opinion that the mandamus ought to issue.

T. T. 1857.
*Queen's Bench*

THE QUEEN
*v.*
JUSTICES OF CORK.

LEFROY, C. J.

The Court being equally divided in opinion, the condition stands discharged, and there will be no rule upon this motion.

Conditional order discharged.

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THE QUEEN, at the prosecution of the Rev. J. ALCOCK

*v.*

SAMPSON FRENCH and others, Justices of Peace for the County of Cork.

E. T. 1857.
*April* 17.

Upon an application to the Court of Quarter Sessions for the reduction of tithe rentcharge, a Magistrate who was land agent of one of the tithe rentcharge payers was present during the hearing of and adjudication upon the application, but it did not appear that he took any part in the proceedings.—*Held*, that the adjudication was not thereby rendered invalid.

IN this case a conditional order, similar to that obtained in the foregoing case, was obtained on behalf of the Rev. J. Alcock, rector of the parish of Kilmeen. The ground upon which the latter order had been obtained was that Mr. French, one of the Magistrates who adjudicated on the case, was the land agent of Mr. Townsend, who was an extensive land-owner in this parish and chargeable with a portion of the rentcharge; but Mr. French had himself no property in the parish, nor was he personally interested in the matter of the adjudication.

Against this order, *Deasy* and *Leslie* showed cause.

*J. Clarke* and *Exham* were heard in support of it.

LEFROY, C. J.

It is the duty of this Court to guard with jealousy the exercise of a peculiar jurisdiction of the nature before us, when the parties are on one side represented on the Bench, and on the other side unrepresented; for, as a rule in this country, clergymen are not appointed Magistrates; on the other hand, however, we are

guard against any malfeasance, but it must be such malfeasance as rests not on artificial but substantial grounds. In this case, if Mr. Townsend had himself sat on the Bench, it would have made a substantial difference; but Mr. French is his agent; and it is not suggested that he could have any imaginable profit or advantage in the result: are we, therefore, on mere suggestion, to suppose that, in his capacity of agent, he would act corruptly? that would not be a safe ground for us to act on. This case is substantially different from the former one, and we must allow the cause without costs.

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## CHRISTIANA DANIEL *v.* M'CARTHY.*

### WILLIAM DANIEL, Garnishee.

M. T. 1857.
*Nov.* 18, 24.

The Court will grant a garnishee order under the Common Law Procedure Act 1856, s. 63, to attach a debt the amount of which is unascertained.

J. O'HAGAN for the plaintiff, who was a judgment creditor of the defendant, applied for a garnishee order to attach a debt due by W. Daniel to the defendant. It appears by the affidavit, that the debt is due by W. Daniel to the defendant for medicines &c., and also for damages for breach of an agreement; the whole sum is unascertained, but is claimed by the defendant to amount to £250.—[CRAMPTON, J. This is not a case of a debt, but of a claim. It is in dispute.]—It is sworn to be a debt, although the amount is in dispute. The terms of the 63rd section of the Procedure Act 1856 are, "to order that all debts owing from the garnishee be attached;" if W. Daniel does not owe to the defendant the amount of the plaintiff's judgment debt, he can come in and show cause.

CRAMPTON, J.—Take a conditional order.†

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* CRAMPTON, J., *solus.*

† No cause having been shown, this order was made absolute, November 24.

M. T. 1857.
*Exchequer.*

## OWENS *v.* M'DONOUGH.

*(Exchequer.)*

*Ja n.* 13.

Action by assignee of a replevin bond. The assignment was executed in the name of the existing Sheriff, by the Sub-sheriff of the late Sheriff, who was also Sub-sheriff of the existing Sheriff. The assignment also, at the commencement, purported to be on behalf of the late Sheriff, who had taken the bond, and it ran thus:—"Know all men, &c., that I, W. H. B., (late Sheriff) do hereby," &c., but was executed in the name of H. H. W., the existing Sheriff.—*Held*, that the bond should be assigned by the Sheriff who took the bond, and not by the Sheriff in being at the time of the assignment being called for.

THIS was an action by the assignee of a replevin bond, [illegible] the Summer Assizes 1856, for the county of Louth, before Pa[illegible] The indorsement of assignment on the bond was as follows: "Know all men by these presents, that the within Wm. H. [illegible] "burne do hereby, at the request of the within named Robert [illegible] "and pursuant to the order made in the cause, assign [illegible] "the said R. Owens, the replevin bond mentioned in [illegible] "pursuant to the statute in that case made and provide[illegible] "witness whereof I have hereunto affixed my seal and sub[illegible] "my hand the 6th day of January 1852. (Seal).

"Neville P. Nunan. Peter Kelly.

"Hans H. Woods, Sheri[illegible]

The pleadings and facts of the case are fully stated in the [illegible] ment of GREENE, B.

*Joy* (with him *Samuel Ferguson*) now showed cause [illegible] a conditional order obtained by the defendant, that a nonsu[illegible] verdict for the defendant should now be entered, pursuant [illegible] leave reserved by the Judge at trial; and cited *Kitton* v. *Fe*[illegible] *Bac. Abr.*, *H.* 3, tit. *Sheriff; Knight* v. *Crockford* (*b*); *Mi*[illegible] v. *Sandford* (*c*); *Hickie* v. *Sandford* (*d*). Counsel refer[illegible] 36 *G.* 3, c. 38, "An Act to prevent vexatious Replevins of Di[illegible] taken for Rent," which provides as follows:—"That from and [illegible] "&c., all Sheriffs and other officers, having authority to [illegible] "replevins, may and shall, in case of replevin of distress for [illegible] "take in their own names from the plaintiff, and two respon[illegible] "persons as sureties, a bond in double value of the goods [illegible]

(*a*) 10 Mod. 288.
(*b*) 1 Esp. 190.
(*c*) 4 Camp. 34.
(*d*) Not yet reported.

"trainable; and that such Sheriff or other officer as aforesaid, "taking any such bond, shall, at the request and costs of the "avowant or person making conusance, assign such bond to the "avowant or person aforesaid, by endorsing the same and attesting "it under his hand and seal in the presence of two or more credible "witnesses," &c.; and also referred to the 5 & 6 *W.* 4, c. 55, s. 6, which provides as follows:—"That every Sheriff of any county, "&c., shall, at the expiration of his office, make out and deliver "to the new or incoming Sheriff a true and correct list and account, "under his hand, of all prisoners in his custody, and of all writs "and other process in his hands, not wholly executed by him, with "all such particulars as shall be necessary to explain to the said "incoming Sheriff the several matters intended to be transferred "to him, and shall therefore turn over and transfer to the care and "custody of the said incoming Sheriff all such prisoners, writs and "process, and all records, books and matters appertaining to the "said office of Sheriff; and the said incoming Sheriff shall thereupon "sign and give a duplicate of such list and account to the Sheriff "going out of office, to whom the same shall be a good and sufficient "discharge of and from all the prisoners therein mentioned and "transferred to the said incoming Sheriff, and the further charge "of the execution of the writs, process and other matters therein "contained, without any writ of discharge or other writ whatsoever; "and the said incoming Sheriff shall thereupon stand and be charged "with the said prisoners, and also with the execution and care of "the said writs, process and other matters contained in the said "list and account, as fully and effectually as if the said writs had "been turned over by indenture and schedule," &c.

*Andrews*, contra, cited *Phillips* v. *Barlow* (*a*); *Hange, assignee of Casewell and Billers*, v. *Manning* (*b*); and also referred to the above statutes.

GREENE, B., at the request of the other Members of the Court, delivered judgment.

I. T. 1857.
*Exchequer.*
OWENS
*v.*
'DONOUGH.

This was an action by the plaintiff, as assignee of a replev
The plaint states that the plaintiff, as collector of county cess
barony of Upper Kells in the county of Meath, made a dis
certain lands in that barony for arrears of cess; that one
Carolan sued out of the Court of Chancery, on the 5th a
1849, a writ of replevin, directed to W. M. Blackburne, S
of the county; that the said W. M. Blackburne afterwards
on the 7th of July 1849, according to the form of the sa
took from Carolan, and from the defendant and one James
a bond, in the sum of £70, to him, whereby they became
to him the said W. M. Blackburne, High-sheriff of the
of Meath, in that sum, conditioned to appear in the Co
Queen's Bench, and prosecute his action of replevin, with
and without delay; and, after averring a breach of that con
and that the bond had thereby become forfeited, the pl
avers that the said W. M. Blackburne, afterwards, to wit
the 6th of June 1852, by an indorsement on said entry
tory, under his hand and seal, made in the presence of and
by two credible witnesses, assigned the said entry obligat
the plaintiff, according to the form of the statute, &c.

The defendant pleaded that W. M. Blackburne, in the
mentioned, did not assign to the plaintiff the said bond
plaint mentioned.

The case was tried before my Brother Perrin, at the A
for the county of Louth; when it appeared, from the evi
of the plaintiff, that, in November or December 1851
Blackburne having been then out of office), he applied to
Ennis (since deceased), who had been Mr. Blackburne's Un
sheriff, and was then also Under-sheriff, for an assignme
the bond, which he promised to give at the Navan Quarter
sions; and that accordingly, on the 5th of January 1852,
handed the plaintiff the bond, with an assignment indorse
it, in his (Ellis') handwriting. This assignment purports
an assignment by W. M. Blackburne. It begins, "I, W. M. Bla
burne," &c.; but the signature, which is also in the handwri
of Ellis, purports to be that of Mr. Hans H. Woods, the

Sheriff. A person named Newman, who acted as replevinger, was examined, and proved the handwriting of Ellis to the bond. He was then asked whether it was the practice of the Sheriff's office in the county of Meath for the Sheriff signing the assignment to affix the name of the Sheriff for the time being, and not that of the Sheriff who was the obligee? This question was objected to, and put at the plaintiff's peril; and the witness answered that such was the practice. The plaintiff having then proposed to read the assignment, it was objected, amongst other things, that it was not conformable to the statute, as it was not an assignment by Mr. Blackburne the obligee; that Ellis had no continuing authority, and that, at all events, the assignment should be in the name of Mr. Blackburne, and not of his successor. The assignment was read, and leave given by the learned Judge to the defendant to move to enter a nonsuit or verdict for the defendant, if the Court above should be of opinion that he ought not to have allowed the assignment to be read.

The question therefore for our consideration is, whether this bond was duly assigned according to the form of the statute, the 36 *G.* 3, c. 38?—[See the Act].—The Act is taken *verbatim* from 11 *G.* 2, c. 9 *(Eng.)*; the words are, "and that the Sheriff or other officer taking such bond shall assign." It would hence appear that the obligee is the proper person to assign, and that he may and ought to do so, even after the expiration of his office. There does not appear to be any right or power in his successor to assign; the bond may never be required to be assigned; it is only at the request and costs of the party who has distrained; he may never call for an assignment; and the assignment, when called for, may be made at any time. In the analogous case of a bail bond, which may be assigned under 4 & 5 *Anne*, c. 16, s. 20, *Eng.*, (which see), the late Sheriff is the proper person to assign: *Impey*, p. 81; *Hange* v. *Manning* (*a*). In that case, the plaintiff was assignee of a bail bond; the defendant pleaded that, at the time of the assignment, the assignors were not Sheriffs, but out of office; and two others were Sheriffs at that time. The plaintiff demurred, and

(*a*) Fortes. 364.

M. T. 1857.
*Exchequer.*
OWENS
*v.*
M'DONOUGH.

judgment for plaintiffs that it was a good assignment. [illegible] of a replevin bond seems *a fortiori*, because the words [illegible] 4 *Anne* are not "the Sheriff taking such bond," as in [illegible] and there seems good reason for the obligee retaining the [illegible] because he is liable to an action for not taking it, or [illegible] insufficiency of the sureties; and the possession of the [illegible] necessary for his protection.

It seems, I think, to be the established practice in Engl[illegible] the Sheriff who takes the replevin bond shall retain, and, if [illegible] to, assign it. In *Scott* v. *Waithman* (*a*), an action was [illegible] against the defendant, as late Sheriff of Middlesex, for [illegible] insufficient sureties in replevin. Notice had been served [illegible] defendants to produce the bond; and it was produced accord[illegible] The defendant then contended that the execution of it [illegible] proved by the subscribing witness; but Abbot, C.J., held [illegible] that was unnecessary, as the execution of it must be tak[illegible] admitted by the Sheriff. Here, it is clear that the defe[illegible] retained the bond after the expiration of their office. As [illegible] in *Edmonds* v. *Challis* (*b*), which was a similar action, [illegible] expiration of the Sheriff's year of office, notice was given [illegible] defendant (the late Sheriff) to produce the bond; he de[illegible] to do so, and secondary evidence was given. The defe[illegible] Counsel then produced the bond, and objected that it could [illegible] be read without calling the subscribing witness. The Judge [illegible] ruled the objection, and it was held that he was right [illegible] doing. In these cases, had the bond been in the custody of [illegible] new Sheriff, the proper course would have been to serve [illegible] with a subpœna *duces tecum*. In *Plumer* v. *Brisco* (*c*), it [illegible] held that the assignment by the Sheriff was an admission of [illegible] execution of the bond. The action was brought in 1847, [illegible] the Sheriff of 1843; and it cannot be doubted, from the [illegible] that the assignment was made after the termination of his [illegible] but it appears to me that there is express authority to [illegible] that the late, and not the incoming, Sheriff is to assign, [illegible]

(*a*) 3 Stark. 168.

(*b*) 7 C. B. 413.

(*c*) 11 Q. B. 46.

the former has taken the bond. In *Thompson* v. *Farden* (*a*), it was held that one of the Sheriffs of London has power to take and assign a replevin bond, without his companion. The action was brought by the assignee of the single Sheriff; and the declaration expressly averred that the Sheriff had, after the expiration of his shrievalty, assigned the bond, and the plaintiff had judgment.

These cases leave no doubt in my mind that the Sheriff who takes the bond may and ought to assign it. It was, however, argued in the present case that, under the statute 5 & 6 *W.* 4, c. 55, s. 6, the bond in question should have been handed over by Mr. Blackburne to his successor; and so from Sheriff to Sheriff, until an assignment was called for; and that the assignment not having been required until Mr. Woods' shrievalty, he was the proper person to assign—[See the Act].—It does not appear to me that bonds of this description are to be handed over; the Act does not appear to have made any alteration in the respective duties of the old and new Sheriff; it substitutes for the old indenture a new mode of assignment of prisoners and unexecuted writs. The case in 1 *M.* & *G.* was decided after the passing of 3 & 4 *W.* 4, c. 99, the English Act, similar to our Act of 5 & 6 *W.* 4; and yet the assignment there was made by the outgoing Sheriff.

Indeed in this very case it appears to have been contended that the late Sheriff (Mr. Blackburne) was the proper assignor; for the assignment professed to be by him. It begun, "I, W. M. B.," &c.; but not only that; the plaint directly alleges that he (Blackburne) executed the assignment. The defence traverses that allegation, and that is the single issue in the case. Now has the plaintiff sustained that issue? I do not think it necessary to inquire whether Mr. Ellis, the Sub-sheriff of Mr. Blackburne, and who unquestionably, during that gentleman's office, might do everything that his principal might do, at least with very few exceptions, can be held to have an authority, after the expiration of the office of his principal, to complete or execute any act which the principal himself might then do, *ex. gr.*, to assign a bail bond or replevin bond executed to his former principal. I think it extremely questionable

(*a*) 1 M. & G. 535.

M. T. 1857.
*Exchequer.*
OWENS
*v.*
M'DONOUGH.

whether Mr. Ellis had any such continuing authority in pe law; but be that as it may, Mr. Ellis has not, in this im professed to exercise any such authority. Had he exerci assignment in Mr. Blackburne's name, the right to do so have been a proper subject for inquiry. But he has done no thing; he has acted as the officer, not of Mr. Blackbur of Mr. Woods. The assignment, though commencing as th of Mr. Blackburne, is authenticated, and, in point of law, ex as the act of Mr. Woods. There is therefore no assignment b or in fact by Mr. Blackburne; and therefore, whether we the legal rights and duties of the Sheriff, or the plaintiff's allegation in his plaint, he has failed to prove his case, and ought to be a nonsuit.

PIGOT, C. B., PENNEFATHER and RICHARDS, BB., concur

## KENNAN *v.* BRENNAN.

T. T. 1857.
*June* 13.

*(Sittings in Banco, after Trinity Term.)*

A tenant *par auter vie* demised to another for one year certain, and afterwards from year to year, should the lessee so desire, during the continuance of the lessor's term. —*Held*, such a letting as to come within the terms of the Apportionment Act, 23 & 24 G. 3, c. 46.

THIS was an action for a proportionable part of rent. The sum and plaint stated that plaintiff, being seised of certain land premises for the life of one John Lambert, demised said pre to the defendant, to hold from the 25th of March 1850, for year certain, at the yearly rent of £35 sterling, and afterw from year to year, should the defendant so desire, during continuance of the plaintiff's said term; said rent to be payable yearly, on the 29th September and 25th March: under whic mise plaintiff entered and continued possessed of said pre until the 9th of August 1856, when said John Lambert died: that the sum of £13. 2s. 6d., being a proportionable part of

ent from the 25th of March to the said 9th of August 1856, as due.

Demurrer by defendant to the summons and plaint, as not averring any facts showing any right in the plaintiff to sue the defendant for proportion of a gale of rent, and as not showing the existence of a y tenancy between plaintiff and defendant, which would authorise the plaintiff in suing the defendant for such proportion.

*Sidney* (with whom was *Richard Armstrong*), for the demurrer.

This case does not come within the Apportionment Statute 4 & 5 *W.* 4, c. 22 (even if that Act applies to Ireland), as there was no written instrument. The question is, whether it is provided for by the earlier Act, 23 & 24 *G.* 3, c. 46? The demise here is not for life, but a demise from year to year, which re-commences every year: *Tomkins* v. *Lawrance* (*a*); and the rent reserved on a demise from year to year is only apportionable when the tenant for life, upon whose death the under-tenancy determines, is the lessor.

*Ormsby*, for the plaintiff.

This is a demise first for one year certain, and so differs from a tenancy from year to year. The words of the 2nd section of the statute of *G.* 3 should be construed so as to include this case, as the Courts will look to the mischief intended to be remedied by the Act: *Paget* v. *Gee* (*b*); where Lord Hardwicke says he had no doubt that a tenant for 99 years, determinable on lives, would be a tenant for life within the meaning of the Act: *Whitfield* v. *Pindar*, cited by Lord Eldon in *Hawkins* v. *Kelly* (*c*). The demise here was in effect a demise for the life of the lessor. In *Swan* v. *Bookey* (*d*), it was held that parol demises from year to year were within the Act of *G.* 3. Lefroy, C. J., says in that case:—"This "Act (*G.* 3) provides for every case where, by the determination "of the estate of the tenant for life, or the failure of the interest "granted, there was no person who could recover;" and again,

(*a*) 8 Car. & P. 729.
(*b*) 3 Swanst. 694.
(*c*) 8 Ves. 308.
(*d*) 4 Ir. C. Law Rep. 582.

T. T. 1857.
*Exchequer.*
KENNAN
*v.*
BRENNAN.

"The Irish Act went further than the antecedent English Act, "and provided for the determination of the lease in other ways, "namely, where the lease was made by a tenant in fee to his "immediate lessee for a life, and by the fall of which, *or in any* "*other way*, the tenant's interest determined; so also a lease for "years determinable upon the death of the tenant for life."—[PENNEFATHER, B. There are no words to that effect in the statute.]—That is the construction which Lefroy, C. J., put on the words of the Act, and for which I contend in this case.—[PENNEFATHER, B. It may be a very proper construction to give to the Act; I do not mean to say it is not; but it is not the Act.]

*R. Armstrong*, in reply.

To bring the case within the statute, the demise should be of a freehold interest. The tenancy here was only a tenancy from year to year after the first year, with all the incidents of such a tenancy, such as the liability of being determined by notice to quit by the landlord.—[PENNEFATHER, B. I consider that it was an absolute demise to the tenant, if he wished to continue holding from year to year, provided the landlord's interest should so long continue, *i. e.*, for so many years as he chooses, if the lessor's interest continue.—GREENE, B. There is a twofold determination, viz., the will of the tenant, and the death of the *cestui que vie;* and I do not see how the landlord could bring ejectment on a notice to quit.]

The words of Lefroy, C. J., in *Swan* v. *Bookey*, are merely a *dictum*, and not necessary for the decision in that case.

PENNEFATHER, B.

I believe this case is one very much of the first impression, a[illegible] it must be decided entirely on the Irish statute of the 23 & [illegible] *G.* 3, c. 46. That statute enacts that where any person seised [illegible] fee or for life of any premises shall demise the same for life, a[illegible] such demise shall determine by the death of the *cestui que* [illegible] before the day on which the rent is made payable; in that case,

lessor, whether seised in fee or for life, shall recover a proportionable part of the rent. In the present case the lessee was tenant for life, and not tenant in fee, and he made a demise, which, if it had been for the life of the *cestui que vie* in his lease, would have been completely and exactly within the terms of the statute. Instead of doing that, he makes a letting for one year certain, and then for so many years as his leasehold interest shall continue, if the tenant shall please to hold the premises so long. It was urged very strongly that this was a mere letting from year to year. This is not so; it could not have been determined by notice to quit by the landlord, because the contract was, that the tenant should hold by the year as long as the landlord's interest continued, provided he should choose so to do. There was no power to the landlord to determine the tenancy, and that is essential to a tenancy from year to year. The *cestui que vie* died in August last, and by his death not only did the interest of the lessor determine, but also the interest of the tenant; for, although it was a letting for years, it was a letting for years with a proviso that the interest of the lessor should so long continue. Now this is clearly within the mischief of the Act. Is it going a great way to say it is within the words of the Act? It is not a demise for life certainly; but it is a demise for years, to be determined on the expiration of a freehold interest. The case before the Chief Justice may not be considered to apply very closely to this case, but it may at all events be used here to show the leaning of the Court in cases of this kind.

We think that the present case is within the mischief of the Act; and we do not strain the meaning of the Act when we say that demises for years, determinable on life, are within the terms of the Act. Therefore it appears to me, I must say, though I have felt considerable difficulty on the point, that we must overrule this demurrer. This sum would be altogether lost if the plaintiff could not bring this action for the proportional part of the rent, because the interest has gone; and we do not think the tenant ought to be exposed to the hardship and inconvenience of being affected by the questions which would arise between the tenant for life and the remainderman, as he would be if the plaintiff could not bring this

T. T. 1857.
*Exchequer.*
KENNAN
*v.*
BRENNAN.

action. He cannot complain of any hardship in being [illegible] pay this gale.

RICHARDS, B.

This case appears to me to turn altogether on the [illegible] *G.* 3. The great difficulty I have found is in considering [illegible] the letting to the defendant amounted to a demise for [illegible] far it was such as is contemplated by the Act. I must [illegible] at strict law, the letting could scarcely be considered for [illegible] there are words of reference in the letting, which would [illegible] give the tenant a title to hold under that letting so long [illegible] Lambert should live; and this in substance is a letting [illegible] life of J. L., provided he chooses to hold so long. This is [illegible] point, and the case is of the first impression. On the whole [illegible] this demurrer must be overruled.

GREENE, B.*

I am also of opinion that we must give this construction [illegible] Act of Parliament. The case is quite within the mischief [illegible] Act; and though, strictly speaking, this was not a demise [illegible] it might last during, and was determinable upon, a life; and [illegible] fore I do not think it is straining the words of the Act [illegible] that the present action is maintainable.

* PIGOT, C. B., absent at Nisi Prius.

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M. T. 1857.
*Nov.* 16, 17.

## W. CORCORAN and ANNE his Wife *v.* CORCORAN

Words imputing incontinence and vagrancy are not actionable *per se*.

DEFAMATION.—The summons and plaint stated the speaking words imputing prostitution to the plaintiff Anne, and calling [illegible]

An allegation that a voluntary promise to confer a benefit on the plaintiff had been retracted or delayed, in consequence of the words spoken by the defendant, is a sufficient statement of special damage; and it is not necessary to aver the intention of the promisor to perform it.

a vagabond, with an innuendo that this word imputed that she was a vagrant without a fixed place of abode; and it also contained a statement that the truth was, that the said plaintiff Anne, finding that her husband W. Corcoran, after his marriage, was in pecuniary difficulties, and unable to support their establishment, came to reside in the house of her brother, K. Dooley, with whom she had continued to reside for the five years previous, and during her husband's absence in Australia, whither he had emigrated three years before, and where he then still resided; and the plaint then alleged the following special damage:—By means of the committing of which several grievances, the said plaintiff Anne hath been injured in her credit and reputation, and brought into disgrace with her acquaintances, in so much that her said brother K. Dooley, who had promised to supply the said Anne with means to enable her to emigrate to Australia to join her said husband, has now, in consequence of the imputations cast upon her character by the said defendant, retracted his promise until the truth or falsehood of the said charges shall have been first ascertained and established; whereby, &c.

Demurrer to the plaint, on the grounds of the words spoken not being actionable, and the special damage stated being too vague, uncertain and remote, as a mere conditional retractation of a voluntary promise for a future act.

*Sidney* (with whom was *E. Hayes*), for the demurrer.

The words imputing prostitution and vagabondism are not actionable: *Campbell* v. *White* (*a*).—[PENNEFATHER, B. I do not think the words used here are actionable.]—The special damage alleged is not sufficient. In *Ashley* v. *Harrison* (*b*), the special damage laid was the loss to the plaintiff (a stage manager) of the profits of a performer who had refused to perform for the plaintiff, through apprehension of being hissed, which apprehension was caused by the defendant's libel; and it was held too remote. *Taylor* v. *Neri* (*c*). There is no authority to show that a mere threat is sufficient to ground special damage.

(*a*) 5 Ir. Com. Law Rep. 312. (*b*) 1 Esp. 48.
(*c*) Ib. 386.

M. T. 1857.
*Exchequer.*
CORCORAN
*v.*
CORCORAN.

*Mullins* and *D. Lynch*, contra.

The special damage is sufficiently alleged, as it states the plaintiff was damnified by the retracting of her brother's promise: *Hartley* v. *Herring* (*a*); *Moore* v. *Meagher* (*b*). In *Davis* v. *Gardiner* (*c*), the special damage laid to a charge of incontinency was the loss of marriage with a certain individual, and it was held sufficient.

The word "vagabond" is actionable, as it imputes vagrancy, which is an indictable offence: 9 *G.* 2, c. 6.—[PENNEFATHER, B. I never knew any case where the word "vagabond" was held actionable *per se.*]

*E. Hayes*, in reply.

The promise here is stated to have been retracted "until the truth *or* falsehood of the charges should be established." Therefore the promise is not totally retracted, but only deferred, as in either alternative of the charges being found true or false, it is to be performed. In the case of the loss of a marriage, there is a loss of an actual benefit, viz., of a complete existing agreement.—[PENNEFATHER, B. I am disposed to think that there must not be a loss of an actual agreement, to constitute special damage, but that it would be sufficient to show a treaty for marriage broken off.]—The promise is a mere *nudum pactum*, and there is no intention on the part of the plaintiff's brother to perform it alleged.

PENNEFATHER, B.*

It certainly does strike me that this summons and plaint would not be good without the allegation of special damage. The words only amount to a charge, as alleged in the innuendo, that the plaintiff is a vagrant without any fixed place of abode; which is not actionable without special damage. With respect to the charge of incontinency, that is no offence punishable under any statute whatever. The pleader has undertaken himself, in the innuendo, to give a sense to the words used, and we are not to intend anything in

(*a*) 8 T. R. 130. (*b*) 1 Taunt. 39.
(*c*) 4 Co. R. 302.
* *Solus.*

favour beyond the sense he has given. I would therefore say this summons and plaint would be bad without laying special age.

Then, as to the special damage laid. I certainly agree that mere rehension of damage would not be a sufficient statement; but e a promise has been laid. It is argued that no averment of the misor's intention to perform it has been made, but I think it st be taken that he intended to perform it, until the contrary shown. In cases of actions for breach of promise, as, for instance, marriage, there is never any allegation contained to that effect, could it be maintained that, without such an averment, the ading would not be sufficient.

Then follows an allegation here that, by reason of the speaking the words, the promisor retracted his promise, and broke off his aty of giving the plaintiff funds to enable her to emigrate. Now, he words stopped there, I think there is no question whatever there was special damage sustained by the breach of a promise ich must have been beneficial to the plaintiff. It has been n ingeniously argued by Mr. *Hayes*, that the fulfilment of this mise must have arrived at some time or other, in consequence of manner in which the summons and plaint goes on (strangely ugh I admit) to state that promise to have been retracted, "until truth or falsehood of the charges should be established." I nk, however, that the meaning of these words is plain, that the mise was retracted until the falsehood of the charge should be ablished. I am not now trying special demurrers, and taking promise as it has been laid; I think there is special damage wn. This is a thing which the promisor has promised and aged to do, and upon a retractation of that promise, even for r so short a time, there is damage.

On the whole, it seems to me that, by reason of the special damage l, although not laid so clearly as might be deemed advisable, this ion is maintainable, that the summons and plaint is good, and refore that this demurrer must be overruled.

M. T. 1857.
*Exchequer.*

## BUTLER *v.* CORCORAN.

*Nov.* 9.

A contractor for the execution of certain works at a Military Barracks, occupying a shed or office in the Barracks, for the purpose of those works, has not a residence there, within the meaning of the Civil-bill Act.

The 97th section of the Common Law Procedure Act 1856, with respect to costs, where the parties reside within the jurisdiction of the Civil-bill Court, is to be construed, with reference to the word "reside," by the 69th section of the Civil-bill Act.

This was a motion by way of appeal from the Taxing-m taxation of the plaintiff's costs—that the plaintiff should be allowed all costs incurred in the action, on the grounds of defendants' having an office and place of business in the town Fermoy, in which place the plaintiff resided; both parties there being, in the terms of the Civil-bill Act (14 & 15 *Vic.*, c. 57, s. resident within the jurisdiction of the same Civil-bill Court.

The action had been brought to recover the sum of £14. 5s. for work and labour, and was tried at the Summer Assizes at C 1857, when a verdict was had for the plaintiff for £5. 4s. 0d. Taxing-officer had, on taxation, allowed the plaintiff half judging the case to fall within the 243rd section of the Co Law Procedure Amendment Act (Ireland) 1853.

The facts of the case appeared to be as follow:—The defend in the year 1856, had entered into a contract with her Maje War Department for the erection of certain works at the Mi Barracks in Fermoy, and had thereupon inclosed a yard wi the Barracks, and built along the wall of the yard a slated which was divided into two divisions by a boarded partition, each division had a door opening into the yard. One of th divisions was used as a workshop, and the other as an office, the latter was called "The Contractors' office." The yard which it was situated was called "The Contractors' yard;" there were other sheds for stone-cutters, &c., erected in it. Th was no name or sign of the contractors over the shed; and it generally, but not always, open in business hours; and the tractors had a foreman of works and a clerk in daily attend The defendants there transacted the business relating to the Ba contract, and also, occasionally, some other business; and persons having business to transact with them were oblige

obtain leave of the guard having charge of the Barrack-gate to pass in to the yard. The defendants' foreman was in the habit of locking up the shed after business hours, and no person slept on the premises.

*E. Sullivan*, in support of the application.

Under the 97th section of the Common Law Procedure Act 1856, if the plaintiff recovers less than £20, when the parties reside within the jurisdiction of the Civil-bill Court, he shall not be entitled to any costs, in the absence of the Judge's certificate. To construe the word "reside" in that section, we must have recourse to the 69th section of the Civil-bill Act, which says that "if any "person shall have and occupy any house or office for the sale "of goods, or for carrying on any business in any county, he shall "be deemed to have a residence within such county;" and here the defendants carried on business or works in their office.

*Exham*, contra.

The first Common Law Procedure Amendment Act 1853 repealed the 40th section of the Civil-bill Act, 14 & 15 *Vic.*, c. 57, which was similar to the 97th section of the last Act. This 97th section now stands by itself, and must be so construed in the natural meaning of the words, and reference cannot be had to the 69th section of the Civil-bill Act for the construction of the word "residence," inasmuch as that section is only to have effect for the purposes of the Civil-bill Act.—[GREENE, B. I think these two sections, the 69th of the Civil-bill Act, and 97th of the Common Law Procedure Act 1856, must be read together. Residence should be construed to mean a place where the Civil-bill can be served.]—There is no rent paid for these premises, and permission was to be obtained to get admittance into them.—[GREENE, B. I cannot distinguish this from the case of a person employed to write in a gentleman's house, and erecting a shed on the latter's premises for his own convenience; surely he could not, in that case, be said to have a residence there.]

M. T. 1857.
*Exchequer.*
BUTLER
*v.*
CORCORAN.

*Sullivan*, in reply.

The defendants carried on other contracts than that of the Barracks in this office.

GREENE, B.*

I have no doubt in my mind as to this case. According to the 97th section of the Common Law Procedure Act 1856, the plaintiff shall not be entitled to any costs where he recovers, in an action of contract, less than £20, if the parties to the action reside within the jurisdiction of the Civil-bill Court of the county in which the cause of action has arisen, unless he obtains a certificate from the Judge at the trial. I have decided that "residence" shall be construed in the manner directed by the Civil-bill Act, s. 69; and the only question, therefore, is, whether this case comes within that Act? Now, what are the facts of the case? The defendants have taken up a particular contract, and have erected this office at the Barracks, on premises belonging to the Crown, for the purpose of completing that contract. They may do other business there; but is it an office or a place of business within the meaning of the Civil-bill Act? It is contended that in that Act the words "any business" mean "any work." I do not agree with that construction. All that the facts of this case amount to is, that this place is the property of the Crown, of the possession of which the defendants may be deprived to-morrow. Their occupation still is that of the Crown, or of the Ordnance. The defendants are no more than the servants of the Ordnance, doing their business. This is not an occupation of, nor a living on, these premises, but nothing more than a mere possession.

In my opinion, this is not a "residence" within the words of the 69th section of the Civil-bill Act; whilst, at the same time, I express my concurrence with Mr. *Sullivan's* argument as to the construction to be put upon the word "reside" in the 97th section of the Common Law Procedure Act.

As the question was a fairly arguable one, I shall not give any costs of this motion, which must be refused.

M. T. 1857.
*Exchequer.*

## BOYLE *v.* MONK.

*Nov.* 16.

In an action upon a covenant dependent on the interest granted by a lease "for 99 years, provided the lessor's interest should so long continue—*Held*, that the summons and plaint, stating the demise merely, was sufficient, without averring the continuance of the interest, which is to be presumed until the contrary be shown.

*Semble.*—The non-execution of a lease by the lessor is a good defence to an action on a covenant to pay rent; *aliter* of a collateral covenant.

ACTION for breach of covenant.—The summons and plaint stated that the plaintiff, by deed dated the 3rd of November 1856, let to the defendant certain lands and premises, to hold for ninety-nine years from the 3rd of November 1856, provided the estate and interest of the plaintiff should so long continue; and that defendant thereby covenanted that he would within six calendar months, computed from the day of the date thereof, lay out and expend to the satisfaction and good liking of the said plaintiff, in permanent and lasting improvements in and upon the said demised premises, the sum of £100 sterling at the least; and the breach averred was, that the defendant, although said period of six months had elapsed, had not laid out or expended on the said premises the said sum of £100, nor any other sum of money whatever.

Demurrer to this summons and plaint, as not showing that the alleged demise to the defendant, or the estate of the plaintiff on which the said demise depended, had any continuance after the making of the said demise, and as not showing that said demise existed sufficiently long to enable defendant to perform said covenant; and as the estate which passed by the said demise was a particular and conditional one, and its continuance or existence did not appear.

*Sullivan*, for the demurrer.

In *Fryer* v. *Coombs* (*a*), which was an action for rent, it appeared that the reversion was conveyed to the plaintiff for his life, if two other persons should so long live; and it was held that the continuance of the lives of those persons should be averred; and the statement that the rent was in arrear, and due to the plaintiff, was not sufficient. In *Dayrell* v. *Hoare* (*b*), it was held

(*a*) 11 Ad. & El. 403. (*b*) 12 Ad. & El.. 356.

M. T. 1857.
*Exchequer.*
BOYLE
*v.*
MONK.

that a defendant in trespass, justifying in a right which he claimed under the estate of a tenant for life, must aver the continuance of that life. Here the covenant on which the plaintiff sues is dependent on the interest of the lease, and it is incumbent on him to show the existence of that interest: *Pitman* v. *Woodbury* (*a*); *Swatman* v. *Ambler* (*b*).

*Tudor*, contra.

This is an independent covenant: *Northampton Gas Company* v. *Parnell* (*c*); *Cannock* v. *Jones* (*d*). But supposing the covenant to be dependent on or connected with the term, there is no determination of the term stated but the ninety-nine years, and the words, "if the plaintiff's estate should so long continue," are but the expression of what is implied in every case, as the landlord can give no more than he has: *Right* v. *Bucknell* (*e*).—[PENNEFATHER, B. Those words were inserted for the protection of the lessor against the covenant for quiet enjoyment.]—The term stated does not differ from one for ninety-nine years simply. Admitting that this is an allegation of a collateral determination of the term, yet the continuance of the lessor's interest (which the defendant admitted, by his acceptance and execution of the lease, to be then existing) will be presumed until the contrary be shown: 1 *Taylor Ev.*, pp. 164, 165, where the cases are collected: *Price* v. *Price* (*f*). Where seisin of an estate has been shown, its continuance will be presumed: *Best, Presumpt.*, p. 186; and the lessor here may be presumed to have a fee. When the commencement of the term has been once shown, it lies on the defendant to show its determination. It is sufficient if each pleading shows a good *primâ facie* case: *Stephen Plead.*, p. 387; *Hill* v. *Sanders* (*g*). At best, this is an objection on the ground of uncertainty, which is a ground only for special demurrer, which is done away with by the 81st section of the

(*a*) 3 Exch. 4.
(*b*) 8 Exch. 72.
(*c*) 15 C. B. 630; S. C. 1 Jur., N. S., 211.
(*d*) 3 Exch. 233.
(*e*) 2 B. & Ad. 278.
(*f*) 16 M. & W. 242.
(*g*) 1 Car. & P. 80; S. C., 4 B. & Cr. 529.

Common Law Procedure Act: *Ferguson's Common Law Procedure Act*, p. 110, referring to *Lindsay* v. *O'Neill* (*a*). *Fryer* v. *Coombs* (*b*) was a case where the plaintiff was deducing the title to the reversion to himself, and where he was bound to state it precisely. But even this is not now necessary: *Lindsay* v. *O'Neill*. In *Pitman* v. *Woodbury* (*c*), and *Swatman* v. *Ambler* (*d*), the lease was never executed at all by the lessor, and the tenant never got that for which he contracted; and so there was no consideration for the covenant: *Wood* v. *The Copper Miners Company* (*e*).

*Sullivan*, in reply.

The want of this averment is not merely ground of special demurrer, but goes to the root of the action. In *Corah* v. *Young* (*f*), an action for work and labour, the want of an averment of the defendant's request was held fatal. *Ingram* v. *Tothill* (*g*) shows that the continuance of the demise should be averred: 1 *Wms. Saund.*, p. 235, *a*. In *Doctrina Placitandi*, p. 90, it is laid down, "Estate for life granted to a *feme sole*, as long as she shall live "*sole*. In claiming this estate she ought, in pleading, to show "performance of the condition, *scil.*, that she was *sole* according to "the condition."—[PENNEFATHER, B. At that time she claims an existing right.]

PENNEFATHER, B.*

In this case the question arises, whether, in this action for breach of covenant, in not laying out the sum of £100 in six months, the plaintiff ought to have averred in the summons and plaint that the term for which he demised was a term for years depending on lives, and that the lives were still in being? I take it to be now settled that, in actions of covenant running with the lands, as for rent, or not repairing during the term, it is necessary that

(*a*) 5 Ir. Com. Law Rep. 461. (*b*) *Ubi sup.*
(*c*) *Ubi sup.* (*d*) *Ubi sup.*
(*e*) 14 Com. B. 466. (*f*) 6 Ir. Com. Law Rep. 138.
(*g*) 2 Mod. 93.

* *Solus.*

M. T. 1857.
*Exchequer.*
BOYLE
*v.*
MONK.

the plaintiff's title should be shown accurately; and that it is a sufficient defence in such actions to show that the lease never existed, or that it is determined by eviction or otherwise; and the cases cited in 3 *Exch. Rep.*, and 13 *Ad. & El.*, show that very clearly. I was very much pressed by the case in 3 *Exch.*, and the judgment of Baron Parke, but I think that case distinguishable from the present. It was an action brought for not keeping the premises in repair during the term; and Baron Parke there says that, "With respect to leases by indenture, the covenants which depend "on the interest of the lessee, and are made because the covenantor "has that interest, such as those to repair and pay rent during "the term, are not obligatory, if the lessor does not execute; not "because the lessor is not a party, but because that interest has not "been created to which such covenants are annexed, and during "which only they operate, as such covenants undoubtedly do not, "if the term ends by surrender, and are suspended by eviction by "the lessor, so they do not begin to operate unless the term com-"mences; the foundation of the covenant failing, the covenant fails "also." But here it appears by the summons and plaint that the lease had existence; it states that the plaintiff demised by deed the premises for a certain term. Now, having demised them, there is a foundation for the covenant to operate on. I think it then lies on the defendant to show that the demise has determined, and it must be presumed for the plaintiff to have continued, until the contrary be shown. This case, therefore, differs from the case in 3 *Exch.*, where Baron Parke observes the term never had existence. It is a covenant to lay out on the premises the sum of £100 within six months; having a term in existence, it lay on the defendant to show that the term or demise had terminated before the cause of action arose. On these grounds, it appears to me that the summons and plaint is sufficient, and that the demurrer ought to be overruled. Formerly it was considered that even a covenant to pay the rent bound the lessee, although the lessor had not executed the lease; this is not law at present, and he is at liberty to show the non-execution of the lease. As to collateral covenants, it is quite clear that they are not affected by the lease not having taken effect.

M. T. 1857.
*Exchequer.*

## BEWLEY *v.* HOUGHTON.

*Nov.* 17.

The mode of pleading given by the Statute of Avowries, 25 *G.* 2, c. 13, is not altered by the 9 & 10 *Vic.*, c. 111, but both Acts must be read together; and therefore, in actions of replevin, a general avowry, without setting out the requisites of the latter statute, is sufficient.—*Quære*, whether in trespass such a general justification would be good, as the Statute of Avowries does not embrace actions of trespass?

REPLEVIN, for taking and detaining of certain cattle, goods and chattels of the plaintiff. The defence was a general avowry, under the statute 25 *G.* 2, c. 13, and stated that the plaintiff was tenant to the defendant, of lands, under a certain rent; that one half-year of said rent was due; and that the defendant took the said cattle, &c., as a distress for the said rent so due. Demurrer to this defence, for not stating the delivery or posting of the particulars of the rent demanded, specifying the amount thereof, the time when same accrued, and the name and place of abode of the person making the distress, as required by the 9 & 10 *Vic.*, c. 111, s. 10.

*Tandy* (with him *D. Lynch*), for the demurrer.

The want of these requisites being performed would render the distress made illegal and void: *Clooney* v. *Watson* (*a*). In *Madden* v. *Bryan* (*b*), a plea to an action of trespass, justifying the trespass as being a distress for rent, was held bad by the Court of Common Pleas, for not setting out a compliance with the requisites of the statute 9 & 10 *Vic.*, c. 111, s. 10. *Brennan* v. *Flood* (*c*) was a decision to the contrary effect by the Queen's Bench; but that was an action of trespass, between which and replevin a distinction exists in respect to pleading, for in the latter the avowry should be strictly pleaded. *Spratt* v. *Murphy* (*d*) was also a case of trespass.

It is laid down in *Ryan* v. *M'Auley* (*e*), that "In replevin, because the plaintiff is to have a return, the avowant ought to make "out a title *in omnibus;* but it is otherwise in trespass, for there "he has only to excuse the trespass." In *Bowler* v. *Nicholson* (*f*),

(*a*) 3 Ir. Jur. 195; S. C., 2 Ir. C. Law Rep. 129.
(*b*) 1 Ir. C. Law Rep. 322.
(*c*) 4 Ir. C. Law Rep. 332.
(*d*) 6 Ir. C. Law Rep. 489.
(*e*) 1 Jebb & S. 330.
(*f*) 12 Ad. & E. 353.

T. 1857.
*xchequer.*
BEWLEY
*v.*
OUGHTON.

Patteson, J., says, "There is a difference between an avowry and "a justification in trespass, in respect to the strictness of setting out "a title; because in an avowry a good title must be set out, but "need not be so in a justification of a trespass, but there he must "show he is not a trespasser; and statute 11 *G.* 2, c. 19 (the "English Statute of Avowries), proceeds on the same distinction; "for the recital there states only that 'great difficulties often arise "in making avowries upon distress for rent,' &c., not alluding to "actions of trespass or pleas in such actions."

The Statute of Avowries would not be done away with by the allowing of this objection; for the intention of that statute was, to obviate the necessity of setting forth a long title in detail in the avowry, as the avowant formerly had to do, for the purpose of showing a privity in law between himself and the person on whom he distrained: *Haire* v. *Lloyd* (*a*); *Poole* v. *Longueville* (*b*); *Banks* v. *Angell* (*c*); *Charters* v. *Sherrock* (*d*).—[PENNEFATHER, B. The question which requires argument here is, whether the objection should be raised in the plea or should come from the plaintiff by a replication.]—The rule laid down in *Stephen on Plead.*, p. 401, that, "with respect to acts valid at Common "Law, but regulated as to the mode of performance by statute, it "is sufficient to use such certainty of allegation as was sufficient "before the statute," is too general, and applies only to a declaration, but not to a plea, in which the performance of the requisites of the statute must be averred: *Duppa* v. *Mayo* (*e*); *Case* v. *Barber* (*f*); *Taylor* v. *Hillary* (*g*); *Adams* v. *Wordley* (*h*). Besides, here is a totally collateral requisite to the Common Law right imposed by the statute, which did not exist before, and it therefore should be averred.—[PENNEFATHER B. May not the two Acts be read together, as if the latter had tacked a proviso to the former, requiring the performance of certain acts in making a distress?]

(*a*) 1 Ridg. P. C. 351.
(*b*) 2 Wms. Saund. 283, *n.* 3.
(*c*) 7 Ad. & E. 857.
(*d*) Alc. & Nap. 17.
Saund. 276, *n.* 3.
(*f*) Sir T. Raymond, 450.

rris, with *Richard Armstrong*, in support of the defence.

Spratt v. *Murphy* (*a*), the Court of Queen's Bench held a al plea such as the present to be good: *Killikelly* v. *Eyre* (*b*). plaintiff might have replied that the notice required by the 0 *Vic.* was not served. In *Whitford* v. *Price* (*c*), the Court xchequer approved of the course taken by the plaintiff, in ing the failure to comply with the requisites of the statute in leading.

he general mode of pleading under the Statute of Avowries is altered by the 9 & 10 *Vic.* In *Richardson* v. *Newenham* (*d*), such objection was raised as in this case.

*D. Lynch*, in reply.

The Common Law Procedure Amendment Act makes against cases of *Brennan* v. *Flood* and *Spratt* v. *Murphy*, as it exds the pleading and forbids the general issue. Whether the eral avowry be good at Common Law or by statute, when re comes a subsequent statute creating a new requisite, that st be averred in the defence; and the former mode of pleading not be made available, by reading the two statutes together. is well established that compliance with the requisites of the atute of Frauds must be averred in a defence, although it d not in a declaration.

PENNEFATHER, B.*

This case is of considerable importance, as regards the question pleading; for I do not consider that the rights of the parties ond the pleadings are at all affected by its decision. It is ite clear, on the words of the statute 9 & 10 *Vic.*, c. 112, at certain matters must be performed by the landlord making distress, or otherwise the distress will be void; but the question fore me is, whether it be necessary, under the circumstances of e case, and the decisions which have taken place, that these quisites should be stated in the avowry, or that the plaintiff

(*a*) *Ubi supra.*
(*b*) 1 Huds. & Br. 156.
(*c*) 6 Ir. Jur. 235–6.
(*d*) 13 Ir. Law Rep. 281.

* *Solus.*

M. T. 1857.
*Exchequer.*
BEWLEY
*v.*
HOUGHTON.

in replevin or in trespass, if he intends to rely on their non-performance, should reply that?

This action is one of replevin; and, so far as decision goes, the Court of Queen's Bench, in the case of *Spratt* v. *Murphy*, has held, in able judgments, although not unanimous, but from which no appeal to a Court of Error has been brought, that an avowry similar to that in the present case is good. I asked, as to *Madden* v. *Bryan*, the first case which came before the Court of Common Pleas since this Act, for a full statement of the defences. That action was one of trespass, and the defences were not avowries, but must be considered as justifications; and though in principle there may not be, in cases of landlord and tenant, a distinction between trespass and replevin, yet it must be considered that while, in trespass, the landlord, as the law formerly stood, could have pleaded the general issue, yet, in replevin, where the avowry goes for a return, and where the landlord had been obliged, before the 25 *G.* 2, to plead very specially, that statute gives the short avowry which has been resorted to in the present case, and which has not been given directly in actions of trespass. On these grounds, I would say that the case before the Common Pleas is distinguishable from and does not govern the present.

Let us now consider how the present case comes before the Court. The avowry is put in under the statute 25 *G.* 2, c. 13, s. 4, which, after stating the difficulties in which landlords were involved in making avowries upon distresses, enacts, that it shall be lawful for every defendant *in replevin* to avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands, tenements or hereditaments whereon such distress was made, enjoyed the same under a grant or demise, or instrument in writing, at such a certain rent, during the time wherein the rent so distrained for incurred, which rent was then and still remains due. That was the 25 *G.* 2, a most salutary Act, and which has remained without any objection, until it is asserted now that it has been altered by the 9 & 10 of *The Queen*. Now a distress made by the landlord unquestionably cannot be lawful,

f certain requisites prescribed by the latter statute be not observed; ut this Act does not repeal the 25 *G.* 2, nor does it, in direct erms, alter the mode of pleading given by that statute. And we nd that, subsequent to the passing of the 9 & 10 of *The Queen*, case occurred, in which the defendant (I allude to the case of *Richardson* v. *Newenham*) put in a general avowry under the 5 *G.* 2. There was no demurrer taken to that; but a replication as put in, attempting to bring the invalidity of the distress before e Court, and stating that the requisites of the statute 9 & 10 *Vic.* ere not complied with. To this replication a special demurrer s put in, which was argued before the Queen's Bench, the pre- nt Lord Justice of the Court of Appeal being the then Chief J stice of that Court, and the Court were of opinion that the repli- ion was bad. The plaintiff's Counsel were both very able yers; but they did not either of them think it right to fall back on the avowry, and allege it to be faulty; nor did that occur to any Member of that Court; and judgment was given for the landlord, not on the avowry, but upon the negation in the replication of these requisites having been performed. I take this then to be a very remarkable case, and one of very great moment, and to be attended to as a full decision of the Court of Queen's Bench, aquiesced in by the eminent Counsel for the defendant. On what principle then am I to suppose that the question was decided?—Not, I take it, on any supposition that the requisites of the 9 & 10 *Vic.* were not to be complied with; but that a pleading under the 25 *G.* 2 was good, without stating these requisites; and I would say that that decision may be supported on the principle which I myself threw out during the course of the argument, but which does not seem to have been brought before the Court of Queen's Bench or Common Pleas, viz., that the 9 & 10 *Vic.*, which did not repeal the general Statute of Avowries, may be considered as sanctioning that mode of pleading, and as if it were introduced as a clause or proviso that the distress should be void, if these requisites be not complied with. I thought this should not be thrown out of the consideration of the present case; and, giving that construction to the 9 & 10 of *The Queen*, I would reconcile all the cases, and

M. T. 1857.
*Exchequer.*
BEWLEY
*v.*
HOUGHTON.

read the last statute as if it had been tacked to the general Statute of Avowries (which it does not repeal), saying, "provided always that the distress shall be void if not made so." Is there anything very wrong in taking that view of the case? I distrust myself much indeed in advancing this view of the case, because I do not see that it was taken in the Courts of Common Pleas and Queen's Bench. Whether it did influence the Court of Queen's Bench, I cannot presume to say; but I cannot shut my eyes, and say that it did not. In *Madden* v. *Bryan*, the plaintiff did not rely exactly upon this point. There was there one general avowry, and another containing an averment of performance of the requisites of the statute, which turned out to be imperfect; but it would appear that, neither in the argument of Counsel, nor in the judgment of the Court, was there any distinction taken between these two avowries. That case is distinguishable from the present, even if they were both cases of trespasss, because the defendant did not rely on a general avowry, but stated something more, and stated that insufficiently. Then there is the judgment of the Queen's Bench in point, and there is the decision in *Richardson* v. *Newenham*, which I think of great weight. It was not attempted there to say that the avowry was insufficient; and it could only have been held sufficient by holding that the 9 & 10 *Vic.* should be incorporated with the 25 *G.* 2, and read together, as if it were in the nature of the proviso which I have mentioned. I therefore think that this demurrer must be overruled.

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## HODSON *v.* M'QUEEN.

*Nov.* 2.

A plaintiff, leaving the jurisdiction after action brought, may be compelled to give security for costs.

THIS was a motion that the plaintiff should give security for co[illegible]t. It appeared that the plaintiff had been resident within the juris[illegible]tion at the time of the commencement of the action, but had s[illegible]

M. T. 1857.
*Exchequer.*
HODSON
*v.*
M'QUEEN.

to reside permanently abroad. This motion had been made Mr. Justice Moore, in Chamber, on a former occasion, and ntertaining some doubt upon it, had directed it to stand over he consideration of the Full Court. The usual affidavit, as to is, had been made.

*ellett*, in support of the motion, cited *Knott* v. *Fitzgibbon* (*a*); *s* v. *Baldwin* (*b*).

IGOT, C. B.

We do not think that there is anything in the plaintiff's having within the jurisdiction at the commencement of the action, to ent the order sought being made now.

Order granted.

(*a*) 4 Ir. Jur. 192. (*b*) 4 Ir. Com. Law Rep. 70.

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## TUCKEY *v.* M'CARTHY.*

T. T. 1857.
*June* 10.

Order to amend copy of writ served, by adding the heading of the Court out of which same issued.

E. CHATTERTON, for the plaintiff, moved for liberty to amend copy of the summons and plaint served, by adding the words, the Court of Exchequer," at the head of the copy from which e words had been omitted, although the *testatum* at foot was, itness, the LORD CHIEF BARON and other Barons of Her Majes- Court of Exchequer at Dublin." The action was of ejectment, the defendant's attorney served the plaintiff with a notice, not led in any Court, cautioning the plaintiff against proceeding on summons and plaint as served. In *Barrett* v. *Wilson* (*a*),

(*a*) 7 Ir. Jur. 39.

* PIGOT, C. B., and GREENE, B., *absentibus*.

T. T. 1857.
*Exchequer.*
TUCKEY
*v.*
M'CARTHY.

Perrin, J., allowed such an amendment, giving the defendant four days to plead, from the time of the service of the order upon his attorney.

PENNEFATHER, B.

You may take a similar order.

RICHARDS, B., concurred.

The following was the order made:—

Ordered, that plaintiff be at liberty to amend the copy of the ejectment served on the defendant, by adding to the heading thereof the name of the Court in which this action is attached, or to serve a new copy of such writ so amended, and this order, on the defendant's attorney; and that defendant do have four days after such amendment, and after service of this order on his attorney, to plead in this action.

## COGHLAN v. CALLAGHAN.*

*(Queen's Bench.)*

*Nov.* 17.

An apprentice, bound by indenture for seven years, while under twenty-one is entitled to put an end to the apprenticeship, when he attains that age, but must give to his master reasonable notice of his intention so to do.

The absenting of himself from his master's service by an apprentice is not an avoidance of the apprenticeship.

The following case was stated for the opinion of the Court, and signed by two Justices of the Peace for the county of the city of Cork, under the 20 & 21 *Vic.*, c. 43, s. 2.

John Coghlan, of the city of Cork, sail-maker, complained before the Justices at the Police Court Cork, that William Callaghan, his apprentice, did, on the 27th of October, and since the 3rd of October 1857, continue to absent himself from the work and service of his master, without leave, and contrary to the covenants of his indenture, whereby he was bound to serve his master for the term of seven years from the 3rd of April 1854. The indenture, which was set out at length, was in the ordinary form, and contained the usual covenants in indentures of apprentices to handicraft trades. The case then stated, that the apprentice issued a cross-summons against the master, complaining that the master refused to give him up his indentures, and to give him a discharge from his service, he having attained the age of twenty-one years, and, having noticed his master of the fact, and of his unwillingness to serve longer. The cases were heard by the two Justices who stated the case; and the fact of the apprentice having absented himself was not denied; but he stated that he did so under the belief that he was not bound to serve longer. The mother of the apprentice proved that her son would be twenty-three years of age on the 6th of January 1858; and the apprentice himself, being examined, proved that he had demanded his indentures from his master, a year and a-half previously to the summons (when he knew of his being of age), and that he reluctantly served from that time, and sought to be discharged. The master proved that the appren-

* CRAMPTON, J., *in Banco, solus.*

M. T. 1857.
*Queen's Bench*
COGHLAN
*v.*
CALLAGHAN

tice did not demand his indentures, or seek to be discharged, on the ground of his becoming of age, until about a fortnight previously to the summons.

The Justices decided that the complaint of the master against the apprentice be dismissed on the merits, the apprentice having attained his age of twenty-one years, and seeking to be discharged; and also, so far as they were enabled so to do, ordered that the apprentice be discharged from his indentures.

The case further stated that the indenture in question bore no stamp, and that the master had given notice of appeal, on the ground that the decision was erroneous in point of law, and had duly entered into recognizance to prosecute his appeal, and to submit to the judgment of Her Majesty's Court of Queen's Bench, and pay such costs as might be awarded by that Court.

*O'Riordan*, for the appellant.

The questions in the case are two; first, can an apprentice, having entered into an indenture of this nature, repudiate it when he attains his age of twenty-one years? and, secondly, if so, has he, in this case, repudiated it in a proper manner? An action cannot be maintained against an apprentice, being an infant; but his master may bring him before the Justices, to be punished for improper conduct: *Gylbert* v. *Fletcher* (*a*).—[CRAMPTON, J. What do you say as to an apprentice repudiating his contract at twenty-one, although the seven years limited by the indentures may not have expired?]—My position is, that he cannot do so: *Ex parte Gill* (*b*). In modern times, the question has been raised more precisely, because it has been held, that an infant pauper may acquire a settlement under the Poor-law Acts in England, by hiring and service: *Rex* v. *Inhabitants of Chillesford* (*c*). An infant may bind himself by a contract for his own advantage, although not by one which is prejudicial to him; this distinction is taken in *Regina* v. *Lord* (*d*). But assuming that the apprentice is entitled to rescind the contract upon attaining his age of twenty-one years,

(*a*) Cro. Car. 179.
(*b*) 7 East, 376.
(*c*) 4 B. & C. 94.
(*d*) 12 Q. B. 757.

the question still remains, has he done so in a proper manner? He ought to have served due notice upon his master of his intention to rescind the contract, and not have run away: 25 *G.* 2, c. 8, ss. 3 & 4; 5 *G.* 3, c. 15, s. 32; 31 *G.* 3, c. 23, s. 23; *Nolan on Poor-laws*, pp. 1, 555. Here the apprentice continues to work with his master, for a year and a-half after attaining twenty-one, and therefore ratified the contract of apprenticeship; but in any case the indentures were voidable merely, not void; and running away would not avoid them: *Gray* v. *Cookson* (*a*). The Justices decided the case upon a misapprehension of law, and discharged the apprentice, simply because he had attained twenty-one, and demanded his indentures; but there was a complaint before them against the apprentice for running away; and it was no answer to that complaint to say, "I am of age, and require my indentures." If an apprentice be allowed to absent himself at any moment he pleases, grave and serious injury may be inflicted upon the interests of the master; the object of notice is to enable the master to provide a substitute for the apprentice.

*E. Sullivan*, for the respondent.

The statute 20 & 21 *Vic.*, c. 43, gives an appellate jurisdiction to this Court upon matters of law, not upon matters of fact. The Justices in this case decided upon matter of fact; the apprentice "sought to be discharged," and the evidence was, that he had demanded his indentures a year and a-half before the summons, and had served reluctantly from that period. It cannot be contended, that an apprentice is not able to avoid his indentures, upon attaining his full age; this, like all other contracts by an infant, is voidable at his election, upon his attaining twenty-one.—[CRAMPTON, J. The question is, did he intimate to his master an intention to avoid the contract?]—The evidence shows that he demanded his indentures long before he left his master. Lord Kenyon, C. J., in *Ex parte Davis* (*b*), puts the very point:—"Every indenture "of an infant is voidable at his election, and, in such cases, the "master must trust to the covenant of those who engage for the

(*a*) 16 East, 13, 28.

(*b*) 5 T. R. 715, 716.

left to be discharged in due course of law.
apprentice may ratify the contract; and I also
runs away, he cannot avail himself of his off
avoidance. That is established by *Gray* v. *C*
*Evered* (c). But the present case comes to this,—
"an apprentice; I demanded my indentures, and,
"served under duress, and eventually I left my m
TON, J. I do not think that it can be called servi
the apprentice, by running away, shows that h
himself an apprentice.]—If he demanded his ind
ran away, the demand is an answer to the off
contract of apprenticeship is terminated by the
*Cookson*. The words, "seeking to be discharg
of the Justices, are not to be referred to th
because there is a distinct dismissal upon that
are to be referred to the original demand. It
that the demand should be made in writing; an
believed the evidence of the apprentice, that he
reluctance from that period, they must have consi
to be a continuous one. It cannot be contended
under protest is an affirmance of a voidable con
state of facts, the decision of the Justices was
law; and, as this Court can only review the
submit that the decision of the Justices must b

*O'Riordan*, in reply, referred to *Chitty on A*

decided in this case; and yet it seems to me that the are now contending about a matter which amounts in nothing. A year and a-half ago, the apprentice, having ed his full age, was entitled either to retain his character apprentice, or to get up his indentures, and put an end to elation of master and apprentice altogether; but, instead opting either of these alternatives, the course which he ed, according to his own statement, is this:—upon becoming that he had attained twenty-one years of age, he applied master to give up his indentures to him; the master did o so; then he does not apply, either to the Justices, or to aster again, but he waives his right, and continues to serve apprentice; and eventually, without further notice, he absents elf altogether from his master, and renders himself liable to nished by the Justices, according to the Act for regulating onduct of apprentices. Now, as he knew that he was to be e upon a particular day, he might have given notice, at a nable time before that day, that he intended to put an end e apprenticeship. The indenture, so far as the apprentice binds elf, amounts only to a parol agreement, which he might have an end to when he attained twenty-one; but it must be after onable notice. He would have had a perfect right, a few days viously, to say, "I will no longer be your apprentice;" but he ld not, upon the very day, say, "I am not your apprentice; I ll forthwith leave your service." In this case, the apprentice ents himself without notice; his master applies to the Justices punish him, and they order him to be discharged from his dentures, and decide that the master's complaint should be missed upon the merits, assigning as a reason, "the apprentice having attained his age of twenty-one years, and seeking to be discharged;" and, accordingly, they do discharge him. But they o not say when he sought to be discharged; whether it was a ear and a-half since, or by the cross-summons; or, according o the master's evidence, a fortnight before the hearing of the ummons. It seems to be the opinion of the Justices, in point f law, that, as soon as an apprentice attains twenty-one, he has

M. T. 1857.
*Queen's Bench*
COGHLAN
*v.*
CALLAGHAN

a right, at once and without more, to discharge himself from his apprenticeship. That is their decision; but still they may possibly have given preference to the evidence of the apprentice over that of the master; and therefore, under all the circumstances, I am disposed to take this course:—I will set aside the order of the Justices, and give no costs, both parties consenting not to take any further proceedings in the matter. I take this course rather than decide peremptorily upon the points suggested in the argument; and this much will be decided, that the course taken by the Justices was wrong in point of law, and it will aid the Justices in such cases for the future.

Appeal ruled in favour of the appellant, without costs, and decision of the Justices quashed.

## ARMSTRONG *v.* M'INERHENY.*

*Nov.* 17.

Upon the death of A, a yearly tenant of land, B, his widow, remained in possession of the land, made use of the stock thereon, and employed the produce of the land to maintain the stock; she also paid rent which had accrued due prior to the death of A, and promised to pay that which became due after his death, but failed to do so; she also paid other debts of A, and upon a sale of the lessor's interest in the Incumbered Estates Court, attorned by deed, as tenant to the purchaser.—*Held*, that B was executrix *de son tort* of A, and as such liable in an action for use and occupation for the rent which became due after the death of A.

THIS was an action, tried before Ball, J., at Ennis, at the Summer Assizes 1857, to recover the sum of £42. 11s. 9d., for use and occupation of the lands of the plaintiff at Ballyvannovan in the county of Clare, being one half year's rent due the 1st of November 1856.

Defence, that one James M'Inerheny, for some time previous to, and up to, and at the time of his death, as hereinafter mentioned, held the said lands under and by virtue of a demise thereof made by the plaintiff to the said James M'Inerheny, as tenant from year to year, which tenancy is still subsisting, unsurrendered and un-

* CRAMPTON, J., in *Banco, solus.*

determined; and the said James M'Inerheny, being so possessed of said lands as such tenant from year to year, died, and the defendant, being his widow, and having resided with him on said lands up to and at the time of his death, remained in possession thereof; and while the defendant remained so in possession, the rent sued for in this action accrued due.

Averment, that the tenancy created by said demise to said James M'Inerheny is still subsisting, and that the estate or interest of said James M'Inerheny in said lands under said demise never vested in the defendant; nor is she, nor was she at the time when the said rent accrued due, or ever, the assignee of said tenancy or of the said estate or interest of said James M'Inerheny in said lands, nor, save by remaining in possession as aforesaid, did she ever use the said lands by the plaintiff's permission, as alleged.

The issues to be tried were:—first, whether the tenancy alleged to have been created under and by virtue of a demise of said lands of Ballyvannovan, from said William Armstrong, the plaintiff, to said James M'Inerheny, is still subsisting, unsurrendered and undetermined, or not?

Secondly, whether the estate or interest of said James M'Inerheny, in said lands of Ballyvannovan, under said demise, ever vested in the defendant, or not?

Thirdly, whether the defendant, at the time when said rent accrued due, was the assignee of said tenancy, or of the said estate or interest of said James M'Inerheny, in said lands of Ballyvannovan, or not?

Fourthly, whether the defendant, save as in the defence mentioned, used the said lands of Ballyvannovan by the plaintiff's permission, as alleged in the summons and plaint, or not?

At the trial it was proved, on the part of the plaintiff, that the defendant's husband had purchased the farm in question, and had been in possession of it until his death on the 25th of September 1856, and that half a year's rent, which had accrued on the 1st of May 1856, was then due. That the defendant, his widow, remained in possession of the farm after her husband's death, and on the 12th of November 1856 paid to the plaintiff's agent the

M. T. 1857.
*Queen's Bench*
ARMSTRONG
*v.*
M'INERHENY

half year's rent which fell due on the 1st of May 1856. That on the 4th of December 1856, the agent of the plaintiff applied to all the tenants, including the defendant, to come in and pay their half year's rent, which had become due on the 1st of November 1856. That the defendant thereupon requested the agent to allow her time for payment, which he accordingly did until the 10th of December, when she said that she would endeavour to pay the rent; but in fact it was not paid, and the farm was afterwards sold in the Incumbered Estates Court. That the defendant executed a deed of attornment to the purchaser, being threatened with eviction if she refused. That after the sale, the defendant told the purchaser that she was the owner of the lands. That she, defendant, had brought the cattle there to eat the hay.

The defendant proved that her husband had died intestate, and that she had not taken out letters of administration to his personal estate. That he had died possessed of several cows, and other property. That the defendant had paid some of her husband's debts, leaving others still due. That she and her children had occupied the farm since the death of her husband; and that the herdsman had cut the hay during the season preceding the trial, and that her husband's cows had eaten it.

The case having closed, the Judge directed the jury to find on the first issue (by consent), that the tenancy was still subsisting; on the second issue, that the interest did not vest in the defendant as assignee; on the third issue, that she was not assignee when the rent claimed by the action accrued due; and on the fourth issue, that the defendant did use the lands otherwise than as stated in the defence. The jury found as directed, and the learned Judge then directed a verdict for the plaintiff for £42. 11s. 2d., subject to be turned into a verdict for the defendant, or to be reduced to £7, being the value of the defendant's occupation from the 25th of September (the date of the death of James M'Inerheny) to the 1st of November 1856, if the Court should so think fit.

*C. Barry* having in this Term (Nov. 5) obtained a conditional order in pursuance of the leave reserved, or to enter judgment for

the defendant, on the grounds of misdirection, and that the verdict was against evidence—

*J. Clarke* (with him *B. O'Loghlen*) now showed cause.

This action is brought for use and occupation, and the defence is, that the defendant remained in possession of the land after her husband's death, paid the half year's rent due at his death, and, having asked for time to pay the gale which fell due after his death, promised to pay it.—[CRAMPTON, J. Is the defendant the executrix of her husband?]—Not otherwise than as executrix *de son tort:* she held herself out to the world as tenant of the lands, and when the landlord's interest was sold she attorned to the purchaser.—[CRAMPTON, J. In whom was the husband's tenancy subsisting?]—The jury merely found it to be subsisting, but did not say in whom it was. This defence is a complete novelty in pleading; it amounts to this:—"I remained in the possession of the premises, but, except as my late husband's widow, I never used the lands." It was proved that the defendant was in possession of the lands, received the profits of them, held herself out as tenant of them, and thus induced the landlord to lie by.

*C. Barry*, in support of the conditional order.

Formerly this defence might have been raised under the general issue; but, the general issue being now abolished, it is necessary to frame the defence in this manner; otherwise, the defendant would have been precluded from showing the circumstances of the case.

The question is, can the defendant be made liable in an action for use and occupation by the plaintiff's permission? She may perhaps be liable as executrix *de son tort*, or on her promise, but not in the present form of action. The action for use and occupation rests on privity of contract, and its whole nature is well explained in the case of *Wyse* v. *Myers* (*a*); in the present case there is no privity of contract between the plaintiff and the defendant. The jury found the tenancy of James M'Inerheny to be a continuing

(*a*) 4 Ir. Com. Law Rep. 101.

*Lyons* v. *Mitchell* (*a*). There is clearly no subsist
for her husband in the tenancy, and the quest
not arise, because she is not sued upon her
accrued principally during the lifetime of th
yet she is not sued as executrix *de son tort*, b
jury found that she was not assignee.—[*Clark*
by direction of the learned Judge, and subj
by this Court afterwards.]—Suppose administ
out, would not the administrator have been ans
How then can two persons at the same time b
*Richardson* v. *Hall* (*b*). The defendant, b
premises after her husband's death, did not bec
*tort*, any further than did any other person
This case cannot be distinguished in this r
*Waterworth* (*c*). The jury were right in findi
was not assignee; an executor is an assignee
legal estate in him, but that is not so in the
*de son tort*. The defendant may possibly be
rent to the extent of the assets which have
*Paull* v. *Simpson* (*d*); but that must be by a fo
from the present one.

*Clarke*, in reply, was stopped by the Court.

Crampton, J.

There is no difficulty in this case, and the j
hold his verdict. The defendant is an execu

nt whose interest is still outstanding, the tenure being undeined; there is no legal assignee, and who then is liable for ent? Is the landlord to be deprived of his rent? No; the provides a remedy: whoever intermeddles with the assets of a or or intestate acquires no right by so doing, but renders elf or herself liable to every action and proceeding to which xecutor would be liable. In this case, the defendant takes ssion of the whole farm and stock; she makes use of the stock, employs the produce of the farm for the purpose of maintain- the stock; she also takes the profits of the farm, from the period er husband's death. It is true, that there is no actual assign- t to her; but, for the purposes of this action, she is an assignee law. It is said that the defendant was not assignee in law. w, undoubtedly, an executor, or an executor *de son tort*, may be rgeable as assignee. She made herself liable by taking posses- of the intestate husband's property, and applying it to her own Besides this, she pays the rent which accrued due before her band's death. Now, the mere payment of debts will not always e a person executor *de son tort*, although sometimes it will do but in this case the defendant pays her husband's debts gene- y, and continues in possession of his farm; rent accrues due r her husband's death, and she promises to pay it; she describes elf as the tenant of the lands; and, continuing in possession, nly by consent of the landlord, renders herself answerable for rent. Then the property changes hands; there is a sale in the umbered Estates Court, and the defendant attorns by deed to the chaser. I never saw a plainer case of a person being executrix *on tort*. There is some embarrassment growing out of the find- of the jury that she was not assignee: that must mean that she not assignee by deed. Again, she was rightly in possession n the moment when the landlord gave his consent to her conti- ng in possession; she became herself the tenant, and liable as h.

I do not take the same view of some of the issues in this case as learned Judge did who tried the case: in my opinion, there uld either have been a verdict for the whole rent, or a verdict

M. T. 1857.
*Queen's Bench*
ARMSTRONG
*v.*
M'INERHENY

for the defendant; there cannot be any such reduction of the rent as the learned Judge has reserved.

Upon the whole case, I am of opinion that the defendant was liable to this rent, and the cause shown must be allowed.

Conditional order discharged.

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## DERRYS and Wife *v.* BYRNE.*

*Nov.* 17.

In action by A and B, his wife, for assault and battery, the plaint, in the first count, complained of damage to both the plaintiffs, "for that the defendant assaulted B, and knocked her down and beat her," &c.; and in the second count, complained of damage to A alone. The defendant pleaded, first, a traverse of the trespasses alleged in the plaint; and, by a further plea, "that B first assaulted the defendant," who thereupon necessarily committed "the alleged assault" in his own defence.—*Held*, upon demurrer, that the second defence was bad; because, while purporting to answer the whole cause of action, it did not confess and avoid the battery, and confessed but one assault.

*Held also*, that schedule C, No. 36 of the Procedure Act 1853, is applicable to the case of an assault merely.

ASSAULT AND BATTERY.—By the summons and plaint, H. W. Derrys and Mary Derrys his wife complained, for that, on the 26th of September 1857, the defendant assaulted the said Mary Derrys, then and still being the wife of the plaintiff H. W. Derrys, and knocked her down, and beat, and kicked, and ill-treated her, so that she became, and afterwards for a long time remained, and still is, sick, &c.; to the damage of both plaintiffs.

And also the plaintiff H. W. Derrys complained, for that the defendant assaulted the plaintiff Mary Derrys, then and still being the wife, &c., and knocked her down, and beat, and kicked, and ill-treated her, so that she became, and afterwards for a long time remained, and still is, sick, &c., whereby the plaintiff H. W. Derrys, during all that time, lost and was deprived of all the comfort, &c.; to the damage of the plaintiff H. W. Derrys.

Defence.—First plea to the action of the said H. W. Derrys and Mary Derrys his wife, denying that the defendant committed the several trespasses in the plaint alleged, or any of them, in manner and form, &c.

* CRAMPTON, J., *in Banco, solus.*

And, for a further plea, the said M. Byrne saith, that the said Mary Derrys first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Demurrer to the second defence.—Because it does not allege or show any justification in respect of the beating, kicking, and ill-treating, in the first and second counts of the plaint respectively alleged; nor does it traverse the same, or at all confess or avoid the same, or any of them: and because the said second defence purports to refer to and justify only one assault, and does not relate to any other trespasses, while, in and by each of the said counts respectively, an assault, and also a battery, and other trespasses, are alleged to have been committed by the defendant: and because the said second defence, purporting to be to the whole cause of action, leaves divers of the trespasses in the summons and plaint alleged altogether uncovered.

*Phillips*, for the demurrer.

The plea only justifies one assault, but two assaults are alleged here: first, the plaintiff and his wife seek damages jointly; and secondly, the plaintiff alone seeks damages. The plea, from the form of its commencement, must be taken to answer the entire plaint; it ought, therefore, to answer every cause of action therein alleged, and yet there is no confession and avoidance of the battery. A battery includes an assault, but an assault may be committed without personal collision.—[CRAMPTON, J. There is a form given in the Procedure Act, schedule C; under that perhaps the plea may be supported.]—That form is only applicable to the case of a mere assault; section 53 provides that the forms in schedule C shall be sufficient in the cases to which they apply, but they are to be varied as occasion may require; to the same effect is the 143rd section.—[CRAMPTON, J. Under the old system of pleading, when *son assault demesne* was pleaded, was it not open to the plaintiff to reply excess?]—Yes; and then the issue joined on the replication was not whether the defendant committed a different trespass from that which he admitted, but the degree of violence only was put in issue. No judgment could be marked upon this plea, however

to the assault in the first count, or to that in th
second defence, instead of the words "alleged
words "alleged trespasses," issue could have b
averment in the plea, that the defendant necess
trespasses, would raise the issue as to excess, w
of replying the excess. The forms given in the
sity be varied according to circumstances, as wi
*Taylor* (*a*); although, by the marginal note in
appear that the pleader made no variation from t
whereas in fact, instead of the words "committed
in his own defence" (which is the form in the A
"did what is complained of," which in this in
have covered the whole plaint. The defendant
fessed any trespass, except an assault, was bound
the other trespasses, but he does not even conc
the words "*quæ sunt eadem;*" and even if h
is decided in this Court that such constructive
suffice under the Procedure Act, as a denial mus
—— v. *Sanford* (*b*). Besides, the plaint here state
and it is settled that such an injury goes beyon
and battery: *Noden* v. *Johnson* (*c*). But, even
to apply to all the causes of action, the matt
defendant is, in point of law, no justificatio
complained of. A mere *assault* by the plainti
violence averred) is no excuse for the personal

v. *Sanford* (*a*) was far less objectionable than this, and yet the Court was unanimous in allowing the demurrer. Besides, objections of this kind were formerly good upon general demurrer.—[CRAMPTON, J. There is no doubt but that you can demur if the defence is a bad one.]

*Hemphill*, in support of the plea.

The Procedure Act 1853 was designed to prevent mere questions of verbal criticism; all that is necessary is, that the pleading shall be good in substance (ss. 81, 83). The fallacy on the other side is, that everything which was formerly matter of general demurrer is so still; but the true rule is, that where a party is embarrassed, he should apply by motion, under the 83rd section, to have the pleading struck out or amended. The objection made to the plea is, that the words "alleged assault" are used, instead of repeating all that was previously mentioned; but, although the plaint contains two counts, they are, in point of fact, the same transaction; and the second differs from the first merely in alleging damage to the husband alone. The plea is copied *verbatim* from the schedule to the Procedure Act, and is there described as a plea of self-defence.—[CRAMPTON, J. Does the second plea apply to the whole plaint? You must lay it down in one way or the other.]—Yes; there is nothing alleged in the plaint which may not be justified by the plea of self-defence. In defence of possession, wounding cannot be justified; but in assault and battery, wounding may be justified, no matter how aggravated it may be, provided it be averred on the plea that it was necessary for self-defence. The utmost which can be said is, that the plea is embarrassing or ambiguous, because it does not appear whether the entire of the trespasses complained of were committed in self-defence; but that is ground for motion, under the 83rd section of the Procedure Act, and not ground of demurrer. In *Weatherill* v. *Howard* (*b*), the denial of the assault in manner and form complained of was held to amount to a denial of the battery.—[CRAMPTON, J. There is great difficulty in saying that the plea covers the whole cause of action, because it justifies

(*a*) *Supra.*

(*b*) 10 Moore, 502.

"special demurrers are abolished, and in lieu
"apply to the Court to set aside any pleading
"ruse; that if a party, instead of so applyin
"demur, that the Court ought to give the plead
"meaning that will support the pleading, if
"fairly bear such a meaning, rather than the
"not support the pleading." Applying that
issue might have been knit upon the plea, viz.
was committed in self-defence?—[CRAMPTON,
certainty here, the first defence is a complet
causes of action; and in the further defence,
is substituted for the word "trespasses," which
the first defence.]—On this demurrer, the pl
only should be regarded by the Court, and th
be urged on the ground of uncertainty or
substance of the plea is what the Court regar
*Precedents* by *Pearson*, framed upon the new
the plea given recapitulates all the trespasses i
and then justifies them under the terms "alle
The object of the recent statutes was to prev
being occupied with trifling discussions; and n
that, in this instance, an issue might be frame
of the case.

*Phillips*, in reply, was stopped by the Court.

this ground, namely, it affects, and manifestly intends, to apply whole cause of action stated; but it justifies only one assault, gh two assaults are laid in the plaint. Under the old system of ing, each count in the declaration was considered as a separate of action, just as, in criminal cases at present, each count indictment charges a separate offence. Here the plea purports to the whole cause of action, but justifies only the assault, does not attempt to justify the acts which are alleged to have wed the assault; as, for example, the kicking, &c. Now, an lt may be committed simply by a gesture; but a battery, ugh involving an assault, is a much more serious offence. I satisfied that the pleader intended to justify the whole cause of plaint; the language which he has used shows that, because the tional plea commences with the words, "and for a further ;" the first plea purported to be an answer to the whole plaint, and therefore the word "action" is there used; and the subsequent plea is a "further plea"—to what? It must the whole complaint; and, confessing an assault, it relies upon plea of *son assault demesne*, but does not justify the battery. sorry to come to this conclusion, because the pleader has been ed by the form given in the schedule to the Common Law Pro- re Act 1853, for pleading in such cases; but that form is icable to the case of an assault simply, and no further. In cases re there are more assaults than one, or where there are other that form must be modified accordingly.

allow the demurrer, but will give leave to the defendant to nd the plea forthwith, on payment of costs.

Demurrer allowed, with costs.

M. T. 1857.
*Queen's Bench*

## TIERNEY *v.* MARSHALL.*

*Nov.* 18.

A was appointed agent and bailiff by B, in 1846, at a yearly salary of £20. In 1851 (£100 being then due for arrears of the salary), A also became yearly tenant of land to B, at a rent of 17. 4s. 11d.; and a verbal agreement was entered into between A and B, by which the annual rent was to be retained by A in part payment of the arrears of his salary, and of the future gales thereof.—*Held*, that this agreement was within the Statute of Frauds (7 *W.* 3, c. 12, s. 2), as it was not to be performed within one year from the making thereof.

*Semble.*—The possibility of an agreement being performed within a year is not sufficient to exempt it from the operation of the Statute of Frauds, s. 2, if in its terms it is not intended to be performed within a year from the making thereof.

REPLEVIN.—Defence, landlord's avowry. Replication, that before any of the rent in the defence mentioned accrued due, to wit, on the 1st of December 1846, the defendant appointed the plaintiff his land agent and bailiff to receive the rents of certain lands, situate in the Queen's County, belonging to the defendant, at the annual salary of £20, which the defendant agreed to pay to the plaintiff; and the plaintiff acted and continued as such agent and bailiff from the time of his appointment until the 17th of November 1856, on which day the sum of £200, being for 10 years of his said salary, became due by the defendant to the plaintiff, and (save so much thereof as has been paid by the retention of the rent hereinafter mentioned) is still due. That on the 13th of September 1851, the defendant set to the plaintiff the lands mentioned in the summons and plaint, and containing 19a. 0r. 26p., at the yearly rent of 18s. for every Irish plantation acre, to commence from the 29th of September 1851. That at the time of the setting of the said lands, it was agreed by and between the defendant and the plaintiff, that the said annual rent, which from time to time thereafter should grow due and payable out of the said lands, pursuant to the said letting, should be retained and kept by the plaintiff in part payment of the arrears then due, and the future gales of the said salary of £20 thereafter to accrue due. That the said rent payable and reserved out of the said lands so set to the plaintiff amounted, pursuant to said letting, to the annual sum of £17. 4s. 11d., and no more, and that such rent, for three years ending on the 29th of September 1856 (being the arrears of rent for which the defendant distrained), amounted to the sum of £86. 4s. 7d., and no more. Averment, that pursuant to

* LEFROY, C. J., *absente*.

the said agreement, the plaintiff was entitled to retain, and did in fact retain, the entire of the said rent, which from time to time accrued due out of the said lands, from the said 29th day of September 1851 to the 29th of September 1856, in part payment of the said amount due for salary as aforesaid, to the plaintiff by the defendant, and thereby all rent due out of the said lands was, before the making of the distress in the defence mentioned, duly paid and satisfied by the plaintiff to the defendant.

The action was tried before LEFROY, C. J., at Maryborough, at the Summer Assizes of 1857. At the trial, it appeared that the plaintiff had acted as the bailiff or agent of the defendant, from the 1st of December 1846; and that he became yearly tenant to the defendant under a proposal and acceptance creating the tenancy, and contained in two letters, dated respectively the 11th and 13th of September 1851, which were given in evidence, but which did not refer to the agreement stated in the replication. That the power of attorney, by virtue of which the plaintiff acted as agent and bailiff for the defendant, was withdrawn on the 20th of November 1856, and that on the following day the distress was made for the arrears of rent. The plaintiff was examined as to the agreement stated in the replication, and upon its appearing that it was entirely verbal, the following objections were taken to the admission of evidence of the agreement. First, upon the Statute of Frauds, that such agreement must be in writing, signed by the party to be charged therewith, being an agreement not to be performed within the space of one year from the making thereof; secondly, also upon the Statute of Frauds, that this alleged agreement was an agreement concerning lands, which required a note in writing, signed by the party to be charged therewith; and thirdly, that independently of the Statute of Frauds, by the general rules of the Common Law, when there is a contract reduced into writing, evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract. The learned

M. T. 1857.
*Queen's Bench*
TIERNEY
*v.*
MARSHALL.

Judge admitted the evidence of the agreement, subject to the above objections, and the jury found a verdict for the plaintiff.

*H. Smythe* having on the first day of this Term obtained a conditional order, pursuant to the leave reserved upon the trial, to enter a verdict for the defendant—

*E. Hayes* (*W. O'C. Morris* with him) now showed cause.

The question is, was evidence of this agreement admissible? The true construction of the 2nd section of the Statute of Frauds (7 *W.* 3, c. 12, *Ir.*,) is, that no agreement comes within its terms, unless it is such an agreement as that both parties are bound to a prolongation of it beyond the year; if the agreement may be performed by one of the parties within the year (although in point of fact it is not so performed), it is not required by the statute to be in writing—[MOORE, J. But is not this a contract *de anno in annum?*]—No, because at the commencement of the tenancy the defendant was indebted to the plaintiff for considerable arrears of salary; and had those arrears been then paid, the plaintiff would have discharged that year's rent; the defendant, therefore, might have put an end to the contract within the year; and this has been the true test from an early period: *Fenton* v. *Emblers* (*a*); *Souch* v. *Strawbridge* (*b*). The case of *Boydell* v. *Drummond* (*c*) does not conflict with this principle, and upon examination will be found to present clear grounds of distinction; the whole scope of the contract in that case showed, that it was not intended to be performed within the year, because, as is remarked by Bailey, J., p. 159, "If the publishers could "by possibility have completed the work within a year, they "could not have compelled the defendant to have taken and paid "for it immediately."—[CRAMPTON, J. Then, according to your argument, this is not an agreement to set off the salary from year to year against the rent.]—No, not beyond the time when the arrears of salary should have been liquidated.—[MOORE, J.

(*a*) 3 Bur. 1279. (*b*) 2 C. B. 808, 814.

(*c*) 11 East, 142.

But two years' rent would not have liquidated the arrears; was it not, therefore, a contract *de anno in annum?*]—No, not *necessarily*, and that is what is required by the statute; had the arrears of salary been paid, then the rent must have been paid, and the agreement would have terminated.—[MOORE, J. That is not any part of the agreement.]—We say that it is; and, in fact on the 20th of November, the plaintiff's power of attorney was withdrawn, and on the 21st of November the distress is made; the defendant, therefore, put an end to the agreement himself at that time; and so, had he paid the arrears within one year from the date of the agreement, he might have then put an end to it; and it would not be an objection that, although an agreement might have been terminated within a year, yet in point of fact it continued for a longer period.—[MOORE, J. Suppose this to be a valid agreement, could the landlord have enforced the payment of the rent until the arrears of salary had been discharged? if not, it is reduced to a matter of arithmetical computation.]—We submit that that is not the test, because, had the defendant done in March 1852 what he did in November 1856, he would have put an end to the relation of employer and agent; there was a *possibility*, therefore, of the agreement being performed within a year, and thus the operation of the statute is excluded, because it applies only where it is *impossible* that the agreement should be so performed. *Donellan* v. *Read* (*a*) also establishes the same principle for which I contend, and that case is conclusive upon the second objection.—[CRAMPTON, J. That objection carries no force.]—As to the third objection, the plaintiff does not seek to vary the contract as to the tenancy; there were in fact three contracts; the first, appointing the plaintiff agent in 1846; the second, creating the tenancy in 1851; and the third, the agreement before the Court, which was not a dealing either with the lands or agency, but simply a contract, that a sum of money due upon the one side should be set off against a sum of money due upon the other, and, therefore, not affecting the previous written contract.

(*a*) 3 B. & Ad. 899.

M. T. 1857.
*Queen's Bench*
TIERNEY
*v.*
MARSHALL.

*H. Smythe* (*J. A. Byrne* with him), in support of the conditional order.

This alleged agreement is spread upon the record in the replication, and the plaintiff cannot alter it by verbal explanation. The agreement as pleaded is, "that the annual rent, which from "time to time thereafter should grow due, should be retained by "the plaintiff in part payment of the arrears then due, and all "future gales of the said salary." Now the arrears of salary were £200, while the rent was £17. 4s. 11d.; and as this rent was to be retained from time to time, the intention of the parties manifestly was, that the agreement should not be terminated within a year. In *Boydell* v. *Drummond* (*a*), Lord Ellenborough states, that "The mischief intended to be prevented by the Statute "of Frauds was the leaving to memory the terms of a contract "for a longer time than a year. The persons might die who "were to prove it, or they might lose their faithful recollection "of the terms of it." That very mischief exists in the case made here by the plaintiff. In *Donellan* v. *Read* (*b*), the Court held the fair meaning of the parties to the contract to be, that the sum named should be expended within the year; but in this case the plain meaning of the parties was, that successively accruing gales should be set off from time to time. It is said upon the part of the plaintiff that, if either party can determine the contract within a year, it is not within the statute, and that, if in this case the arrears of salary had been paid within the year, the agreement would have been at an end; but even if that principle were conceeded, no such construction can be put upon this agreement, it is quite beside it. On the second objection, I shall not trouble the Court. As to the third objection, he cited *Gee* v. *Lord Nugent* (*c*).

*J. A. Byrne*, on the same side.

The strength of the argument on the other side is that, even if the scope of the agreement be that it shall continue beyond a

(*a*) *Supra.* (*b*) *Supra.*

(*c*) 5 B. & Ad. 58, 65.

year, yet, if it may be terminated upon a given event within the year, it is not within the Statute of Frauds; but that argument is fallacious: *Dobson* v. *Collis* (*a*).—[He was then stopped by the Court.]

*W. O'C. Morris*, in reply.

In 1851, a tenancy from year to year is created between the plaintiff and defendant, the agreement averred in the replication being also entered into at the same time. The position of the parties therefore was this:—on the one side, was rent accruing yearly in respect of the yearly tenancy, and on the other side, and co-existing with the tenancy, were arrears of salary to be set off against the rent. To bring this agreement within the Statute of Frauds, it lies upon the other side to show that it was incapable of performance within the year, because that statute derogates from the Common Law. This is not a contract setting off a gross sum against yearly accruing rent; but it is a springing contract in each year, by which, if the tenancy be not sooner determined by notice to quit, a sum of money is to be set off *de anno in annum*, against the rent receivable *de anno in annum;* the contract is contingent upon the continuance of the tenant's interest, and that might be determined within the year. There is a simple test applicable to this case: suppose the agreement had been in writing, and that the landlord, having served a notice to quit, had brought an ejectment, could it be contended, as grounds for an injunction, or by way of equitable defence, that the agreement to set off the rent gave the tenant a right to insist upon holding possession until the arrears of salary were cleared off? Clearly not; and therefore, since the contemporaneous existence of the agreement cannot prevent the determination of the tenancy, it follows that the agreement might be terminated within the year.—[PERRIN, J. The fact of its being defeasible within a year will not take it out of the operation of the statute, if, in its terms, the contract is not intended to be performed within a year.]

(*a*) 1 H. & N. 81.

M. T. 1857.
*Queen's Bench.*
TIERNEY
*v.*
MARSHALL.

CRAMPTON, J.

The Court is unanimously of opinion, that the objection founded upon the Statute of Frauds ought to prevail. It appears to me, without going minutely into the case, that this contract was of such a nature as that it could not have been performed within the year. The arrears of salary amounted to upwards of £100, while the annual rent was but £17. 4s. 11d.; and therefore, taking it arithmetically, it was wholly impossible that the contract could have been completed within the year. The intention of the parties, which is what we have to consider, seems to have been that the rent should be annually set off in liquidation of the arrears of the salary. I am also of opinion, that the possibility of the contract being determined is not material. The authority cited by Mr. *Byrne* is very clear.

PERRIN and MOORE, JJ., concurred.

Rule absolute.

## STEPHENSON *v.* QUIN.*

*Nov.* 20.

In an action against C. Q., for work and labour for J. Q., deceased, at his request, and for money paid for J. Q. in his lifetime, and at his request, the writ of summons and plaint in the title of the cause in the margin described C. Q. as executrix of J. Q., deceased, and by the plaint "the said C. Q." was summoned to answer the complaint, &c.—*Held*, upon demurrer, that C. Q. ought to have been described in the body of the plaint as the executrix of J. Q. deceased, and that the description in the title of the cause did not cure the omission.

THIS was an action for work and labour as a proctor, and for money paid.† The parties were described in the title of the summons and plaint as follows:—"George Stephenson, of Lisburn, "in the county of Antrim, Proctor, in Diocesan Court of Down "and Connor, plaintiff; Catherine Quin, of Bowers Hill, in the town "of Belfast and county of Antrim, widow and administratrix of "Thomas Quin, deceased, defendant." The first paragraph of the

* CRAMPTON, J., *absente.*

† The plaint in this case was not settled by Counsel.

plaint was in the following terms:—"Victoria, &c. The said "Catherine Quin, the defendant, is summoned to answer the com- "plaint of George Stephenson, who complains that the defendant is "indebted to the plaintiff in the sum of £49. 5s. 10d., for the work "and labour of the plaintiff, as a proctor, in and about the business "of the said John Quin, in his lifetime and at his request; and "for money paid and advanced by the plaintiff in carrying on said "business on account of the same, at the instance and request of "said John Quin in his lifetime."

Demurrer to the above paragraph of the plaint.—Because it is not stated therein that the said defendant promised to pay or become answerable for the work and labour therein stated to have been done for the said John Quin, or for the money therein stated to have been paid and advanced for the use of the said John Quin, or that such work and labour was done, or that such money was paid and advanced, as aforesaid, at the request of the said defendant; and because it is not stated or shown how, or in what manner, or upon what ground, the defendant is answerable or liable to pay for said last mentioned work and labour and money.

*T. P. Lynch*, in support of the demurrer.

No cause of action is shown by the plaint against the defendant, either in her individual capacity or in her representative character. First, if she be sued in her individual capacity, the liability must be founded upon contract. There is no express contract alleged, nor are facts stated which can raise a promise; the plaint is for work and labour done for John Quin, at his request, in his lifetime.—[MOORE, J. Is the defendant named as executrix in the plaint?]—Not in the body of the plaint. If it should be contended that the word "indebted" raises an implied assumpsit, then the consideration (if any) is a past one, and a request upon the defendant's part should have been alleged.

Secondly; if the defendant is sought to be made liable as executrix, the plaint should contain an allegation to that effect. Prior to the Procedure Act, the settled rule of pleading was, that a declaration should consist of positive and traversable allegations; and the

M. T. 1857.
*Queen's Bench*
STEPHENSON
*v.*
QUIN.

question therefore is, whether the Procedure Act has made any difference in this respect between a declaration and a plaint? Section 9 provides for the title of the cause, and section 10 provides, that "if the plaintiff shall sue, or the defendant be sued, otherwise "than in his own right, the summons and plaint shall state the "character in which and the title by which he sues, or in respect "of which the defendant is sued." Therefore the former section being conversant with the title of the cause, and the latter with the pleading itself, there is no change in this respect in the rules of pleading under the present and former systems. The title of the cause is no part of the pleading: it is mere description, not traversable, and there being no averment that the defendant is the personal representative of John Quin, no denial of the fact can be pleaded.—[MOORE, J. There is no doubt but that, under the old rule of pleading, the representative character must have been shown in the declaration itself.]—No change is made in this respect by the Procedure Act, which, on the contrary, in schedule B, gives a form of a plaint against an executor, in which it is stated, "that the defendant is executor," &c., showing, that where a person is charged in a particular character, the plaint must contain as matter of pleading an averment to that effect. He referred to *Brigden* v. *Parkes* (*a*), when the Court called on—

*J. F. Walker* (with him *Roper*).

A reference to one or two sections of the Procedure Act will show that there is no ground for this demurrer. The defendant is sued as executrix, and is so described in the title of the plaint. Section 10 of the Procedure Act provides what the plaint shall contain, and, amongst other things, it must state "the venue." Now, the venue is never stated in the body of the plaint; therefore the title is part of the plaint, within the meaning of the Act; and we thus have the defendant's character of executrix stated on the face of the plaint, and if not traversed by the defence, it must, by section 60, be admitted.—[MOORE, J. Look at the form given in schedule B; must not that be construed with the Act?]—The schedules are

(*a*) 2 B. & P. 424.

part of the Act; but by section 241 they may be modified or departed from; and all departures and omissions, which have not a manifest tendency to mislead or prejudice the opposite party in the merits of his case, shall be deemed to be technical and immaterial. The defendant knew the character in which she is sued; the writ is addressed to her as "the said Catherine Quin," viz., as described in the title, and the cause of action is work and labour for her deceased husband. Under the old law, if the venue was stated in the margin, but omitted from the body of the declaration, it was held that the statement in the margin was sufficient: *Welland* v. *Browne* (*a*); *Barden* v. *Magennis* (*b*).—[MOORE, J. The whole objection is, that you have not shown the character in which the defendant is sued. You have a form given in the schedule to the Act, and why did you not follow it?]—The defendant could not have been misled as to the character in which she is sued; and if she was in any way embarrassed, she might have moved, under section 83 of the Procedure Act, to have it struck out or amended. The scope of this Act is to do away with the strict technicalities of pleading, and literal adherence to the forms in the schedules is not required: *Gason* v. *O'Ryan* (*c*); *Norton* v. *Johnson* (*d*).—[MOORE, J. The form given in the schedule to the Act contains a statement of the character, not only in the title, but also in the body of the plaint, and that would appear to make the allegation in the body of the plaint as necessary now as formerly.]—This is not an omission having a manifest tendency to mislead, and might, if an error, have been amended, even under section 16 of the Procedure Act.

*Lynch*, in reply, was stopped by the Court.

LEFROY, C. J.

This demurrer must be allowed. As far as the Legislature has given an adherence to forms, it is clear that they must be followed. The Legislature has very largely dispensed with forms; but where

(*a*) H. & J. 46.
(*b*) 6 Ir. Law Rep. 345.
(*c*) 7 Ir. Jur. 272.
(*d*) 7 Ir. Jur. 126.

M. T. 1857.
*Queen's Bench*
STEPHENSON
*v.*
QUIN.

it has not only not dispensed with them, but, on the contrary, has given a specific form, we are not to dispense with the Act of Parliament. In the present case, a form is given in which a party is to be sued in a representative character, and that form is not to be departed from, where the departure from it, as in this instance, would be to make the summons and plaint insensible and absurd. The plaintiff may amend, upon payment of the costs of this demurrer.

Demurrer allowed.

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## SUGRUE *v.* HOVENDEN.

*Nov.* 21.

If a Sheriff makes a seizure under a writ of *fi. fa.*, the plaintiff cannot take the defendant in execution under a writ of *ca. sa.*, until the writ of *fi. fa.* is returned, although he abandons the seizure of the goods.

A Sheriff, having seized under a writ of *fi. fa.*, has no power to abandon the seizure, but must make a due return to the writ.

A writ of *fi. fa.* was issued on November 9th, upon a judgment obtained by A against B. The writ was returnable on 12th of November. The Sheriff, on November 10th, went to the lands of B; but, considering his goods and chattels insufficient in value, gave back the writ to A, whose attorney, on the same day, took the *fi. fa.* to the office, where it was cancelled, and a *ca. sa.* issued, under which B was arrested on 13th of November.—*Held*, that the arrest was irregular, and that B should be discharged.

Practice in the Master's office.

M. O'Donnell, on behalf of the defendant, moved that the writ of *capias ad satisfaciendum* issued in this cause, under which the defendant was arrested, be set aside, and that the defendant be discharged from custody. It appeared, by the affidavit of the Sheriff, that judgment had been obtained in this Court against the defendant, on the 5th of November 1857, for a sum of £43. 8s. 5d., and that, on the 9th of November 1857, a writ of *fieri facias* was issued on foot of this judgment, and delivered to the Sheriff of the Queen's County, which writ was returnable on the 12th of November 1857. That, on the receipt of this writ, the Sheriff went to the lands of the defendant, situate within his bailiwick, but found nothing upon the lands except two old horses and a cow. That he did not know whose property they were, as he had been informed and believed that the defendant was in the habit of taking in and grazing cattle; and, having informed the defendant's wife of the object of his visit, she stated that the only property belonging

to the defendant were the two old horses, and that the cow belonged to a neighbour, who immediately claimed and removed it. That the Sub-sheriff then went to the field where the horses were, and, after examining them, found that both were labouring under some distemper, and that one was blind; and believing that they were not worth £3, and, if sold, would do little more than pay the expenses of seizure and sale, he declined to take them away, and so informed the defendant's wife. That he saw and knew of no other property of the defendant within his bailiwick, except a few articles of furniture, not worth, in the whole, £3; "and that he did "not make any seizure upon any property of the defendant other "than aforesaid." That, finding no other property, "save as aforesaid," on the said lands, he came away, and did not leave any seizure on said horses, or any bailiff or agent, either on that or any subsequent occasion, in care or charge of the same. That there were not, upon the said occasion, or whilst the writ of *fi. fa.* was in his hands, goods or chattels of the defendant, on the said lands, or elsewhere within his bailiwick, sufficient to pay the amount of the plaintiff's judgment; that, on the 10th of November, he informed the plaintiff of these facts, and returned the writ of *fi. fa.* to the plaintiff.

By another affidavit it appeared that, on the 11th of November 1857, the clerk to the plaintiff's attorney brought the writ of *fi. fa.* to the proper officer, who cancelled it, by cutting his name off from it, and thereupon issued a writ of *capias ad satisfaciendum*, directed to the Sheriff of the county of the city of Dublin, under which the defendant was arrested on the 13th of November, being the day after the return day named in the writ of *fi. fa.*

*M. O'Donnell.*

The officer affects to cancel the writ by cutting off his name; but that is wholly ineffectual. Two writs cannot be concurrently acted upon, at least in cases between subjects: *Fennell* v. *Dempsey* (*a*); *Miller* v. *Parnell* (*b*). There may be a difference in the case of

(*a*) 1 Ir. Jur. 64. (*b*) 6 Taunt. 370.

M. T. 1857.
*Queen's Bench*
SUGRUE
*v.*
HOVENDEN.

extents by the Crown. The Sheriff in effect made a seizure, and had no right to withdraw.

*W. A. Exham*, for the execution creditor.

First, the fact of seizure is in dispute. The Sheriff states that he did not seize; and this case therefore is distinguishable from *Fennell* v. *Dempsey*, because there an actual seizure had been made; secondly, there were not concurrent writs in this case.—[MOORE, J. Why did not the Sheriff discharge his duty, and make a return?]—Because, since the passing of the Common Law Procedure Act 1853, s. 191, which makes writs returnable out of Term, if a writ is given back to the officer in its original state, so that he can retain it, he will cancel it, by cutting off his name or tearing off the seal, and will then issue the other writ, but will not allow both writs to be out concurrently.—[MOORE, J. That practice is very objectionable, when the writ has gone into the hands of the Sheriff. Suppose property of adequate value had been seized under the writ of *fi. fa.* Here the Sheriff has taken upon himself to decide that question.]—An application would not have been made to cancel the writ, if there had been sufficient property to be seized under it. The distinction between this case and the cases cited upon the other side is, that the writs are not concurrently executed in this instance; the *fi. fa.* was cancelled on the 11th of November, and the *ca. sa.* was not executed until the 13th of November.—[LEFROY, C. J. The writ is matter of record; the transaction between the parties is not matter of record. In this case, there are two writs as of record, although no return has yet been made to the first writ; and if the record were now made up in this case, it would so appear. Can the officer, by his act, or cancelling, as it is called, defeat a matter of record?]—But, here no seizure was made under the first writ.—[LEFROY, C. J. That is not so; the Sheriff's affidavit states, "no seizure, save as aforesaid."—MOORE, J. The Sheriff had no right to refuse to seize.]—He also cited *Edmond* v. *Ross* (*a*); *Dicas* v. *Warne* (*b*); *Primrose* v. *Gibson* (*c*); *Hodgkinson* v. *Walley* (*d*); *Ferg. Prac.*, vol. 1, p. 445.

(*a*) 9 Price, 5. (*b*) 10 Bing. 341.
(*c*) 2 D. & Ry. 193. (*d*) 2 Tyr. 17; S. C., 1 D. P. C. 298.

*M. O'Donnell*, in reply, was stopped by the Court.

M. T. 1857.
*Queen's Bench*
SUGRUE
*v.*
HOVENDEN.

LEFROY, C. J.

If we were to allow this practice to be adopted, it would be giving the officer liberty, not only to administer the law of this Court, but to make it. It is quite clear that, when a writ of *fieri facias* is put into the hands of the Sheriff, no other execution ought to issue until that one is disposed of; and the only mode of disposing of it is by the Sheriff's return to the writ. The officer cannot substitute his own judgment, or the acts of the parties, for a legal return; if he does so, it is an inconvenient and mischievous practice, and enables the Sheriff and creditor to dispose of property in a very objectionable manner. The law must be regularly administered, in order to afford due protection; and we think that this proceeding is quite irregular. The defendant therefore must be discharged, and with costs, if he undertakes not to bring any action.

Rule accordingly.

[See *Andrews* v. *Saunderson* (*a*) and *Kane* v. *Bridgman* (*b*).]

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*Nov.* 23.

*W. A. Exham* now moved for liberty to issue a writ of *capias ad satisfaciendum*. The defendant has been discharged, pursuant to the decision of the Court; the effect of that decision is, that no writ can issue until a return has been made to the writ of *fi. fa.* originally issued; but that writ has been cancelled, and therefore, in consequence of this fatality, no return can be made to it. Unless this application is granted, the creditor cannot reap the fruit of his judgment.

LEFROY, C. J.

We will grant a conditional order, permitting you to issue a new writ, and prefacing it with a recital of the reasons for which it is granted.

The following order was made:—

It appearing that the writ of *fieri facias*, which heretofore

(*a*) 1 H. & N. 725.
(*b*) 5 Ir. Law Rep. 222.

M. T. 1857.
*Queen's Bench*
SUGRUE
*v.*
HOVENDEN.

issued in this cause, has not been returned by the Sheriff, in consequence of the said writ having been destroyed, let the plaintiff be at liberty to issue such new writ of execution in this cause as he may be advised, unless cause be shown to the contrary, in open Court, during the Sittings thereof on Wednesday next, serving this order forthwith upon the defendant's attorney.

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*Nov.* 25.

*W. A. Exham* now moved, that the conditional order of the 23rd of November be made absolute. No cause was shown against the conditional order.

LEFROY, C.J.

It is right to prevent misapprehension in this case. The officers of the Court have made a representation to us of what passed in the office upon the occasion of issuing the writ of *capias ad satisfaciendum;* which is, that when the writ of *fieri facias* was brought to the office, it was represented that nothing whatever had been done with the writ, and not, as the fact was, that the writ had been handed to the Sheriff, and that he had made a seizure under it, and had abandoned that seizure. It occurs to me, however, that it would be a very proper matter for the Court to consider, whether there should not be a check put upon that practice, and that, when an attorney comes for a new writ, he should be required to lodge a certificate that nothing has been done upon the former one, in order that it should not rest upon parol statement merely. The public ought not to be exposed to the chance of a writ being partially executed, and then another writ issued.

Order absolute.

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NOTE.—The practice in the Master's office (Queen's Bench) at present is, that when a writ is returned before the return day named therein, the attorney is required to indorse upon the writ a certificate under his hand, that the same has not been delivered to the Sheriff, nor has any use been made of it.

M. T. 1857.
*Queen's Bench*

## THE QUEEN, at the prosecution of HARLOW T. PHIBBS, *v.* CHARLES SEDLEY.*

*Nov.* 25.

When the circumstances, upon which a motion for liberty to file a criminal information is grounded, occurred during Term, such motion may be made within the last four days of Term.

JAMES ROBINSON moved for a conditional order, for liberty to file a criminal information.—[LEFROY, C. J. Can this application be made on the last day of Term?]—The circumstances, upon which the application is grounded, occurred on the 14th of November, during the present Term; and such case is an exception to the General Rule,† that applications of this nature cannot be made within the last four days of Term.

Conditional order granted.

* CRAMPTON and MOORE, JJ., *absentibus.*

† This Rule is as follows :—25th of November 1776. No motion for attachment, information, or mandamus, shall be moved within the last four days of Term.

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NOTE.—It would appear that the Court reserves to itself a discretion to relax the above Rule, under special circumstances. In the case of *The Queen*, at the prosecution of J. D. Meldon, v. *The Commissioners of the Board of Works*, 28th of January 1856, the Court intimated that such motions may be moved within the last four days of Term, if the more pressing business of the Court shall have been disposed of.

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## DEE *v.* DEE.*

H. T. 1858.
*Jan.* 21.

In the Court of Queen's Bench, liberty to file a replication must be on notice.

*Jellett*, having moved in this case for liberty to file a replication—[CRAMPTON, J. Have you served notice of this motion?]—No.

*Per Curiam.*

It is a rule of this Court, that liberty to file a replication must be on notice.

* *Coram* CRAMPTON, J.

M. T. 1857.
*Queen's Bench*

## Court of Criminal Appeal.*

### THE QUEEN *v.* CATHERINE WARD.

*Nov.* 26.

In an indictment for stealing goods, and receiving the same, knowing them to be stolen, a blank was left for the name of the owner of the goods. —*Held*, that this omission was not a formal defect, within 14 and 15 *Vic.*, c. 100, s. 25.

THE prisoner was indicted before the Assistant-Barrister of the county of Longford, at the October Quarter Sessions, for stealing a wooden bowl, containing eleven pounds weight of butter, the goods and chattels of Catherine Kennedy; and also for receiving the same goods, knowing them to be stolen.

Upon the conclusion of the case for the prosecution, the Assistant-Barrister called for the indictment, and observed that there was a blank left for the name of the owner of the goods; but upon the application of the Sessions Crown Prosecutor, pursuant to the 14 & 15 *Vic.*, c. 100, s. 25, the Assistant-Barrister directed the indictment to be amended, by filling up the blank with the name of Catherine Kennedy, who had been proved to be the owner of the goods; at the same time, he expressed his doubts whether he had power to make the amendment in the case of a total omission. The prisoner was convicted and sentenced; but the sentence was respited, until the decision of this Court should be ascertained as to the power to order the amendment to be made. The Assistant-Barrister referred to the case of *Sill* v. *Regina* (*a*).

*Corballis*, for the Crown.

There was no appearance for the prisoner.

MONAHAN, C. J.

We must follow the case of *Sill* v. *Regina*. There is no valid distinction between that case and the present one. It is the duty of the Judges, in these cases, to see that the prisoner is properly convicted.

Conviction quashed.

(*a*) 17 Jur. 207.

* *Coram* MONAHAN, C. J.; PIGOT, C. B.; CRAMPTON, BALL and KEOGH, JJ.; PENNEFATHER, RICHARDS and GREENE, BB.

M. T. 1857.
*Cr. Appeal.*

## THE QUEEN *v.* HELEN ROBERTS.*

*Nov.* 26, 30.

The forging, in Ireland, of an indorsement upon a bill of exchange drawn abroad upon a person resident in Ireland, payable to the order of a person resident in Ireland, and also payable in Ireland, is an offence within the 39 *G.* 3, c. 63. A bill of exchange, set out in an indictment for forging the indorsement thereon, purported to be drawn in "Philadelphia."—*Held*, that the Court would not presume that Philadelphia was not the name of a place in Ireland.

FORGERY.—The following case was submitted for the opinion of this Court by RICHARDS and GREENE, BB.:—

The prisoner was convicted before Baron RICHARDS and me at the last Sitting of the Commission Court, upon an indictment, a copy of which is hereunto annexed.†

* *Coram* MONAHAN, C. J.; PIGOT, C. B.; CRAMPTON, BALL and KEOGH, JJ.; and PENNEFATHER, RICHARDS and GREENE, BB.

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† The first count of the indictment was as follows:—The jurors, &c., present, that Helen Roberts, late of Killucan, in the county of Westmeath, spinster, on the 6th of May, in the year of our Lord 1857, at Kingstown, in the county of Dublin, having in her custody and possession a certain bill of exchange, which said bill of exchange is as follows; that is to say—

ROBERT TAYLOR and Co.

"No. 57,322. £1. 10s. 0d. sterling.
Philadelphia. 4th April, 1857.
On demand, pay to Mary M'Carthy, or order, one pound, ten shillings, for value received, which charge to the account of,
Yours, respectfully, ROBERT TAYLOR & Co.
To Messrs. Corscadden & Co., Londonderry."

She, the said Helen Roberts, afterwards, on the day and year aforesaid, at Kingstown, aforesaid, in the county of Dublin, aforesaid, feloniously did falsely make, forge and counterfeit, on the said bill of exchange, an indorsement of the said bill of exchange, which said falsely made, forged and counterfeited indorsement is as follows; that is to say, "Mary M'Carthy," with intent thereby then and there to defraud, contrary to the form of the statute, in such case, &c., and against the peace, &c.

The second count was for feloniously uttering the indorsement, knowing it to be forged.

The third count was for forging an indorsement on a certain bill of exchange, purporting to be the indorsement of Mary M'Carthy.

The fourth count was for uttering the indorsement, charged in the third count, knowing it to be forged.

The fifth count was similar to the third count, but stating the indorsement to be that of "Anne Smith."

The sixth count was similar to the fourth count, but stating the indorsement to be that of "Anne Smith."

M. T. 1857.
*Cr. Appeal.*
THE QUEEN
*v.*
ROBERTS.

*Curran*, on behalf of the prisoner, moved to have judgment arrested, as far as related to the counts setting out the bill of exchange, and to have a verdict of acquittal directed upon the general counts, upon the ground that, according to the laws in force in Ireland, the fact, charged in the indictment, of forging, or uttering as genuine, a forged indorsement upon such a bill of exchange as was set out in the indictment and proved in evidence does not amount to a criminal offence.

The indictment was grounded upon the Irish statute 39 *G.* 3, c. 3, which made the forging or uttering an indorsement upon "any bill of exchange" a capital felony. This statute is still in force, although the punishment has been mitigated, first, to transportation for life, or for seven years, or imprisonment, by 1 *Vic.*, c. 84.

The prisoner's Counsel contended that the case did not fall within 39 *G.* 3, c. 63, inasmuch as that statute, although using the general terms, "any bill of exchange," must be construed as confined to inland bills of exchange only, inasmuch as a subsequent statute, namely, the 43 *G.* 3, c. 139, amounts to a legislative exposition of the 39 *G.* 3, and to a declaration that the latter Act did not include foreign bills.

The 43 *G.* 3, c. 139, is intituled "An Act for preventing the "forging and counterfeiting of foreign bills of exchange, and of "foreign promissory notes, and orders for the payment of money; "and for preventing the counterfeiting of foreign copper money;" and enacts, amongst other things, that, if any person shall, within any part of the United Kingdom of Great Britain and Ireland, falsely make, forge or counterfeit, &c., any bill of exchange, purporting to be the bill of exchange of any resident in any foreign state or country, with intent to defraud any person whatsoever—whether such bill of exchange be in the English language, or in any foreign language or languages—or partly in one, or partly in the other, or shall, within any part of the United Kingdom, utter, &c., any such forged bill of exchange, every person so offending shall be deemed to be guilty of felony, and be transported for any term not exceeding fourteen years.

The statute 43 *G.* 3, c. 139, being an enacting, and not a decla-

ratory statute, Counsel for the prisoner submitted that the bill set forth in the indictment fell expressly within the description of the enactment, which, for the first time, made the forgery of such a bill criminal, and made it punishable in a different and less penal way than the 39 *G.* 3, c. 63, had made the offences therein mentioned punishable. That had the forgery of a foreign bill of exchange been understood to have been provided for by the 39 *G.* 3, the 43 *G.* 3, c. 139, would have been unnecessary; and that if the 39 *G.* 3, c. 63, had embraced such a case as the present, the Legislature must be supposed to have intended to alter the 39 *G.* 3, c. 63, so far as related to the punishment; and further, that if the 43 *G.* 3, c. 139, was introductive of a new law as to the forgery of foreign bills, it must, in Ireland (where it is still unrepealed), be considered as the only statute applicable to foreign bills, in which case the indictment could not be supported under it, inasmuch as, although it provides for the case of forging the bill of exchange itself, it is silent with respect to the forging or uttering of an *indorsement* upon a bill.

The cases of *Rex* v. *Dick* (*a*), *Rex* v. *M'Kay* (*b*), were relied upon by the prisoner's Counsel, and also a passage in *Chitty's Criminal Law*, vol. 3, p. 1034, in which Mr. *Chitty* seems to have been of opinion that the 43 *G.* 3, c. 139, had been passed in consequence of the previous English statutes, 2 *G.* 2, c. 25, and 7 *G.* 2, c. 22 (which are analogous to the Irish Act 39 *G.* 3, c. 63), having included only inland bills.

The 43 *G.* 3, c. 139, has been repealed as to England, so far as it relates to the present inquiry, by the 11 *G.* 4, and 1 *W.* 4, c. 66, which consolidates the English Acts relating to forgery, and in the 3rd section enacts substantially the provisions in the English statutes of *G.* 2; but Ireland is expressly excluded from the operation of 1 *W.* 4, c. 66, and consequently the 43 *G.* 3, c. 139, is in force in Ireland with respect to any offences which properly and in point of law fall within it.

The 30th section of 1 *W.* 4, c. 66, was adverted to, as affording some light as to the proper construction of the 3rd section, and as

(*a*) 1 Leach, C. C., 68. (*b*) Russ. & Ry. 71.

M. T. 1857.
*Cr. Appeal.*
THE QUEEN
*v.*
ROBERTS.

showing that a bill of exchange, such as was the subject of the present indictment, would come within the words of that section, consequently within the similar words of the 39 *G.* 3, c. 63 *(Ir.)*

No direct authority, as it appeared to me, had been adduced bearing upon the point submitted by the prisoner's Counsel; and as the case is one of considerable importance, and as a serious and possibly extensive class of offences in Ireland are dispunishable, should the objection made by the prisoner's Counsel prevail, I thought it right, with the concurrence of Baron RICHARDS, to reserve the point for the consideratiton of the Court of Criminal Appeal, and to respite the sentence.

The questions, therefore, upon which I respectfully request the opinion of the Judges are:—First, whether the indictment in this case (that is, so far as it sets out the instrument) is sustainable under any statute in force in Ireland, and if so, what statute? Secondly, if the facts charged in the indictment do not constitute an offence within any such statute, do they disclose any indictable offence at Common Law?

I have only to refer, in addition, to one or two cases not cited on the argument, and also to a precedent which I have found. The cases are *Rex* v. *Kirkwood* (*a*), and *Rex* v. *Goldstain* (*b*). The precedent is to be found in the *Crown Circuit Companion*, p. 254 (edition of 1820), and purports to be upon the statutes 2 *G.* 2, and 7 *G.* 2 *(Eng.)*, and was framed long before the 43 *G.* 3, c. 139. This precedent is adopted by Mr. *Starkie* in his volume *on Criminal Pleading*, who, although he wrote long subsequently to 43 *G.* 3, c. 139, does not refer to that Act, but only to the statutes of *G.* 2.

(Signed) RICHARD W. GREENE.

*J. A. Curran* and *W. J. Sidney*, for the prisoner.

*Corballis* and *H. Concannon*, for the Crown, in addition to the authorities mentioned in the case stated, cited *Regina* v. *Fulton* (*c*); 4 *Stephen's Coms.*, p. 205, 2nd ed.; 2 *East, P. C.*, p. 852.

*Cur. ad. vult.*

(*a*) 1 Moo., C. C., 311. (*b*) 3 Bro. & B. 201.
(*c*) Jebb., C. C., 48.

M. T. 1857.
*Cr. Appeal.*
THE QUEEN
*v.*
ROBERTS.
*Nov.* 30.

MONAHAN, C. J.

This case was reserved from the late Commission, by RICHARDS and GREENE, BB. The prisoner, Helen Roberts, was charged with forging the indorsement of Mary M'Carthy on a bill of exchange, which appears upon the indictment to have been drawn in Philadelphia, dated the 4th of April 1857, and directed to Messrs. Corscadden & Co., Londonderry; and by this bill, Robert Taylor and Co. required Messrs Corscadden & Co. to pay Mary M'Carthy or order the sum of £1. 10s. for value received. At the trial, it appeared that the bill was in fact drawn in Philadelphia, in the United States of America; but it was supposed that the objection could be taken in arrest of judgment, as the bill of exchange, as set forth in the indictment, purported to be drawn in Philadelphia: this however is a mistake; there is nothing in the indictment to show that the Philadelphia where the bill was drawn may not be the name of a place in Ireland. We do not, however, intend turning the party round on an objection of this sort; we shall dispose of the case as if the objection was taken in the course of the case. It is alleged on the part of the prisoner that, inasmuch as this bill of exchange is drawn in the United States, though upon a person resident in this country, and payable to the order of a person resident in this country, and payable in this country, that there is no Act of Parliament rendering the forging of the indorsement of the person so resident in this country, to whose order the bill is payable, a criminal offence. The question is, whether this case comes within the 39 *G.* 3, c. 63, s. 1 *(Ir.)*, which makes the offence of forging "any bill of exchange," or "endorsement of any bill of exchange," a felony punishable with death? The punishment under this Act has however been mitigated to transportation or imprisonment, by subsequent Acts.* Now, there is no doubt that the words of this Act of Parliament are sufficiently large to embrace all bills of exchange, whether foreign or inland; and I think there can be no doubt also that the forging of the indorsement, in the present case, of a person resident in this country, on a bill payable in this country, is within not only the words but the mischief

* 1 *Vic.*, c. 84; 16 & 17 *Vic.*, c. 99; 20 & 21 *Vic.*, c. 3.

M. T. 1857.
*Cr. Appeal.*
THE QUEEN
*v.*
ROBERTS.

of the Act. The question is, whether there is anything to take the present case out of that enactment? The argument for the prisoner is that, because the subsequent Act, the 43 *G.* 3, c. 139, expressly makes the forging of foreign bills a felony, punishable by transportation, that this impliedly amounts to a legislative declaration that foreign bills of exchange are not within the enactment of the previous Act, the 39 *G.* 3, c. 63; and cases have been referred to which, it is alleged, show it was considered at least doubtful whether foreign bills would come within this latter Act. The first case cited is *Regina* v. *Dick* (*a*), where the note which was forged was a Scotch one, made and payable in Scotland, and so appearing upon the face of it: so also the case of *Rex* v. *M'Kay* (*b*); the document forged was the promissory note of a Scotch corporation, payable of course in Scotland. The argument of Counsel for the prisoner in that case was, that the note in question could only be sued for in Scotland, was altogether a foreign contract, and therefore, it was asserted, not within the Act. It may be doubted whether that was the true ground of the decision, or whether it was not that the Corporation in question had no power to issue notes at all; but, whether this be so or not, these cases show that the doubt which existed upon the previous English Act, and therefore upon the Irish one (39 *G.* 3, c. 63), was altogether with reference to the forgery of bills of exchange in themselves altogether foreign contracts; but no such doubt was ever suggested in relation to bills which, though drawn abroad, were payable in this country to the order of a person residing here. The 43 *G.* 3, c. 139, recites, that the practice of forging foreign bills, &c., had greatly increased, and that plates of such notes, bills and orders, had been in some instances engraven within the United Kingdom, &c.; and that it is expedient that effectual provision should be made for preventing the same; and enacts, that if any person shall, within any part of the United Kingdom, forge any bill of exchange, &c., purporting to be the bill of exchange, &c., of any foreign prince, state or country whatsoever, &c., or of any person resident in any foreign state or country, &c., every person

(*a*) 1 Leach., C. C., 68. (*b*) Russ. & Ry., C. C., 71.

so offending shall be guilty of felony, punishable by transportation. This statute evidently applies to bills made and purporting to be made out of this country, and in the dominion of a foreign prince, &c., leaving wholly unprovided for indorsements on bills purporting to be made out of England in any of the English colonies. There is an express saving at the end of the 2nd section, providing that nothing in the Act contained "shall extend, or be construed to "extend, in any manner whatsoever, to repeal or alter any law "or statute then in force for the prevention or punishment of "forgery in any respect whatsoever, within any part of the United "Kingdom." This is an express legislative enactment, that this Act shall not in any manner alter the then existing Acts for the prevention of forgery. We are therefore obliged to determine what is the true construction of the previous Act, the 39 *G.* 3, c. 63. What is to take out of this statute the case of the forgery of the indorsement, in this country, of a bill of exchange, though drawn abroad, upon which an action may be brought in this country? The case does not depend upon abstract reasoning; and it is impossible to doubt but that *Kirkwood's case* (*a*) is strongly in point with the present case. There may be some doubt as to the grounds of that decision in *Moody's Reports;* but the argument of Sir George Lewin (*b*) puts it upon the proper ground, namely, that the offence was complete in England, and although the note forged in that case was an Irish one, yet the Governor and Company of the Bank of Ireland might be sued upon it in England.

Since the argument in the present case, my Brother GREENE has found a case, *Ryland's case* (*c*), in a volume of remarkable cases tried at the Old Bailey, in which the prisoner Ryland was convicted and executed, for forging the indorsement of a person resident in London, on a bill on London, drawn abroad; that case is in every respect similar to the present. There is also a civil case, *Mead* v. *Young* (*d*), which was an action against an acceptor of a bill of exchange drawn at Dunkirk, by a person resident there, on a London merchant, payable to the order of Henry Davis, a

(*a*) 1 Moo., C. C., 311.
(*b*) Lewin, C. C., 142, 144.
(*c*) Old Bailey Rep. 316.
(*d*) 4 T. R. 28.

M. T. 1857.
*Cr. Appeal.*
THE QUEEN
*v.*
ROBERTS.

person also resident in England. Lord Kenyon held at the trial that, because the indorsement was that of H. Davis, it could not be shown by evidence that the H. Davis who indorsed the bill was not the H. Davis to whose order it was made payable; but the other three Judges were of opinion that that was a mistake; and in the course of their judgments, both Buller and Ashurst, JJ., clearly lay it down that, if H. Davis who indorsed the bill could have been caught, he would have been hanged for the forgery.

We entertain no doubt that, upon the true construction of the 39 *G.* 3, c. 63, and the proviso in the 43 *G.* 3, c. 139, s. 2, and also upon the general principle that an affirmative Act of Parliament does not impliedly repeal a previous one, that the prisoner was properly convicted. I have omitted to mention the reference to the 11 *G.* 1, and 1 *W.* 4, c. 66; but that Act is clearly corroborative of the view which we have taken of the case, because that Act, by the 29th section, is not to extend to Scotland or Ireland; but by the 30th section, express provision is made for its application, so far as England is concerned, to the forging or uttering in England of bills of exchange purporting to be made or actually made out of England.

My Brothers CRAMPTON, PENNEFATHER and KROGH, who are not now present, concur in this judgment.

Conviction affirmed.

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NOTE.—The prisoner was subsequently sentenced by CRAMPTON, J., at the Commission Court, Dublin, on the 7th of December 1857, to three years' penal servitude.

H. T. 1858.
*Consol. Cham.*

## Consolidated Chamber.

### DEERING and others *v.* LAWLER.*

*March* 2.

A lease, granted in excess of a leasing power, but operating in Equity, under the 12 and 13 *Vic.*, c. 26, s. 2, as a contract for a grant of a valid lease, pursuant to the power, is not an equitable defence to an ejectment on the title, under the Common Law Procedure Act *(Ir.)* 1856, s. 85.

*Semble*—An agreement for a lease is not an equitable defence to an ejectment on the title, within the meaning of that section.

*Dictum* of CRAMPTON, J. in *Turner* v. *M'Auley* (6 Ir. Com. Law Rep. 257), observed upon.

EJECTMENT ON TITLE.—The defendant pleaded for defence, upon equitable grounds, that, by an indenture, dated 12th of June 1844, the lands, which were the subject-matter of the ejectment, were settled on M. D. Thomas and his assigns, for life, with remainder to his first and other sons in tail, with power to lease for twenty-one years; and averred that, in 1853, M. D. Thomas agreed to lease the lands to the defendant, for the life of the defendant or thirty-one years, which should last the longest, at a rent of £20, which was the best rent that could be then gotten for the same. That upon the treaty for the lease, M. D. Thomas represented, and the defendant believed, that M. D. Thomas had power to grant a lease for the said term. That by indenture, dated 5th of December 1853, M. D. Thomas demised said lands to the defendant, for the life of the defendant or thirty-one years, which should last longest, at a rent of £20, and subject to the covenants and agreements therein. That the said lease was made *bona fide*, and was, in every respect, authorised by and in conformity with the said power, save as to the term and duration thereof. That immediately upon the execution of the lease, the defendant entered into, and had since continued in possession of, the lands, and had expended large sums of money in improving and draining them. That M. D. Thomas died in 1855, and that the plaintiffs had no title to the land, other than under the limitations of the indenture of 12th of June 1844. And the defendant alleged that the lease of the 5th of December 1853 was valid as a subsisting lease in Equity, for the term of twenty-one years from the date thereof, which term was still unexpired, at the rent and subject to the covenants and reservations therein contained.

* *Coram* MONAHAN, C. J.

H. T. 1858.
*Consol. Cham.*
DEERING
*v.*
LAWLER.

*E. Hayes* now moved that this defence be set aside. The defence does not disclose any grounds upon which a Court of Equity would grant a perpetual and unconditional injunction. The lease set out in the defence is an excessive execution of a power to lease; and, at the utmost, it can only operate, by virtue of the 12 & 13 *Vic.*, c. 26, s. 2,* as a contract for the grant of a valid lease under the power, upon such terms as the Court of Chancery might impose. The power only authorises the creation of a chattel interest; but the lease in question attempts to create a freehold.

[He was then stopped by the Court.]

*C. Shaw*, contra.

I admit that a defence cannot be pleaded as an equitable defence under the Common Law Procedure Act 1856, s. 85, if it discloses cross-equities which are to be adjusted between the parties, so that a Court of Law cannot do complete and final justice in the case. This is clearly laid down by Coleridge, J., in *Gee* v. *Smart* (*a*):— "The question is, whether this is such a plea as, under the 83rd "section of the Common Law Procedure Act 1854 *(Eng.)*, we are "authorised to receive? and several cases have decided that, to make

(*a*) 26 Law Jour., Q.B., 305, 307; S. C., 3 Jur., N.S., 1057, 1058.

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* This section is as follows:—"And be it enacted, that where, in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament, or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease; such lease, in case the same have been made *bona fide*, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary, in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract."

Proviso, where grantor or reversioner is willing to confirm the lease without variation.

"it such, the facts it discloses must entitle the defendant to an "absolute and perpetual injunction, against the judgment which the "plaintiff might otherwise have obtained at Law. If our Common "Law judgment, on the plea for the defendant, will not do final "justice between the parties—but the plea is in the nature of a bill "in Equity, calling upon the Court for that sort of conditional and "manifold award, which is in the nature of a decree in Equity, and "not a judgment at Law—we cannot entertain it, because we have "no authority to pronounce or machinery to enforce such an award." —[MONAHAN, C. J. Assuming now that you are entitled to relief under the 12 & 13 *Vic.*, c. 26, your present lease operates as a contract for a valid lease for twenty-one years, pursuant to the leasing power; then the lessee must covenant to yield up possession of the demised premises at the expiration of that period; and it is necessary therefore that there should be a perfect instrument determining the rights of the parties.]—The defendant's lease operates as a valid lease in Equity for twenty-one years.—[MONAHAN, C. J. No; the statute says, "it shall be considered in Equity as a contract for a grant of a valid lease." Suppose the defendant had gone into possession of the land, under an agreement in writing for a lease, but which did not amount to a lease at Law, he would have become legal tenant from year to year; then, if an ejectment were brought after notice to quit, would the agreement amount to an equitable defence in a Court of Law?]—Yes, if the agreement, like the lease set out in this defence, contained everything that was necessary, even to the covenant to pay the rent; in such a case, complete justice may be done, by allowing the tenant to remain in possession under his contract. This is similar to the case put by CRAMPTON, J., in *Turner v. M'Auley* (*a*):—"Suppose (not an uncommon case in this country) "a tenant in possession, under an agreement to hold for a certain "time, at a certain rent, without any contemplation by the parties of "leases to be executed, such a tenant may have a fair ground of "equitable defence against his landlord's ejectment on the title; or, "suppose the case of a tenant holding under a lease for lives renew-"able, and the lives to be extinct, without default upon the tenant's

(*a*) 6 Ir. Com. Law Rep. 245, 257.

H. T. 1858.
*Consol. Cham.*
DEERING
*v.*
LAWLER.

"part, in such a case, an equitable plea would be open to the "tenant." The true principle which governs the Court, in the exercise of the equitable jurisdiction given by the Common Law Procedure Act 1856, is laid down by Pigot, C. B., in *Kane* v. *The Dublin and Wicklow Railway Company* (*a*):—"What we have therefore "to consider is, will this replication tend or fail to do justice between "the parties?" And, after commenting on some English authorities, the learned Judge proceeds:—"The plain and clear principle "decided by these cases is, whether or not there is anything substan- "tial to be done by a Court of Equity, that could not be done by us "in granting the remedy here sought?" In that case, an equitable replication was sought to be pleaded to a contract set up in answer to an action for work and labour; it was not an ejectment, as in the present case, but the principle in either case is the same. Substantial justice will be done by allowing the tenant to remain in possession under an instrument which admittedly is conformable to the leasing power in all respects, except the duration of the term or interest.

*E. Hayes* was not called upon to reply.

MONAHAN, C. J.

As far as I can form an opinion, in this case, of the facts stated in the equitable defence before me, the defendant is entitled to relief in Equity, by filing a cause petition to oblige the plaintiff to grant such lease as the defendant claims to be entitled to; and I have no doubt that, pending such suit, the defendant will obtain an injunction to prevent the plaintiff executing an *habere* founded on the judgment in this case. But, though this is my opinion on the merits of the case, still I am of opinion that the case is not one for an equitable defence in a Court of Law; such a defence can be available in a Court of Law, only where the defendant is entitled to an injunction absolutely in a Court of Equity, and where nothing more remains to be done. In this case, which I consider substantially as the case of a defendant holding under an agreement for

(*a*) 9 Ir. Jur. 160, 162.

a lease, a Court of Equity would not grant an injunction in a suit instituted merely for that purpose; it would grant an injunction, only as incidental to a suit for a specific performance of the agreement for the lease. It is the right of the landlord to have the agreement specifically executed by the execution of regular leases, defining the legal rights of the parties; and the tenant cannot prevent the landlord enforcing his legal right to recover possession of the lands, except by submitting to execute a regular lease. With respect to the cases to which I have been referred, in which Mr. Justice CRAMPTON seems to have expressed an opinion that, in a case like the present, or the case of a tenant holding under a lease, with covenant for renewal, the defendant would be entitled at Law to file such an equitable defence, I do not profess to distinguish such cases from the present; but the point did not arise for decision before him. If he had decided the precise point, I, sitting here alone, would not feel myself at liberty to overrule a decision of his; but, as the matter arose merely incidentally before him, I do not feel myself precluded from acting on the opinion I entertain, and which, if the case were argued before him, as it has been before me, I think he also would entertain. I am aware of the cases in which a defendant has been allowed to plead, as an equitable defence, that, by mistake, a particular clause was introduced into or omitted from the agreement on which the action was brought, though it was insisted that the only remedy the party had was a proceeding in a Court of Equity to reform the agreement. There are cases in which all the rights of the parties may be finally determined in the particular action; but, in my opinion, they have no application to a case like the present, where the tenant claims to hold the lands, the subject of the ejectment, for a term of several years. In my opinion, he cannot be entitled so to hold, except on the terms of executing a lease. I will therefore set aside the defence, but restrain the plaintiff from issuing an *habere* until the fifth day of next Term, in order to give the defendant an opportunity of applying to the Court of Chancery for an injunction in the meantime.

E. T. 1856.
*Common Pleas*

## In re TRENCH'S ESTATE.

*(Common Pleas.)*

*May* 12.

John Trench the elder, being seised as tenant in tail of the lands of C., by marriage settlement of 28th of February 1804 conveyed the lands to trustees, "to hold the said premises unto the said (trustees), and to the survivor of them, and to the heirs of such survivor, for and during the term of 500 years, to the use of John Trench for life; and, in case there was issue of both the bodies of John Trench and Mary his wife, then to the use of the eldest son for life." There was no indorsement of livery; the deed was not enrolled, and the trustees, who were not relatives of the parties, never entered into possession. Hubert, the eldest son, became of age in 1827, and, between that period and 1833, he and his father respectively confessed several separate judgments. On the marriage of Hubert, the lands were re-settled by a deed of 2nd of March 1834, by which John and Hubert conveyed the lands to trustees, upon the uses following, viz., to permit Hubert to receive the issues and profits of three-fourths, and John of one-fourth, of the lands, during their respective lives; and, in case there should be issue male of said marriage, then to the use of the eldest son for life. In 1836, John and Hubert created a rentcharge, to secure certain of the said judgments; and, in 1842, Hubert confessed another judgment. There was issue John Trench the younger. John the elder died in 1848. Hubert died in 1853, having previously taken the benefit of the Insolvent Act. John the younger, who was a minor, entered, claiming under the deeds of 1804 and 1834.—*Held*, that the deed of 1804 could not operate to pass a freehold estate, but that its effect was to create immediately a term of 500 years; that the deed of 1834 operated as a grant of the reversion of the term, which nevertheless continued subsisting until disaffirmed by the issue in tail; that the entry of John the younger, claiming under the deed, had not the effect of avoiding the term, and that as he had a beneficial interest in one of the trusts of the term, and was a purchaser for value, the judgment creditors had no right against his life estate, under the 3 & 4 *Vic.*, c. 105, s. 22.

THIS was a case sent by the Commissioners of the Incumbered Estates Court for the opinion of the Judges of the Court of Common Pleas.

The case stated as follows:—John Trench, being seised in tail male of the lands of Carraine, on his marriage, in 1804, executed an indenture of lease and release, dated the 28th of February 1804, whereby the said John Trench, for the considerations therein mentioned, and by virtue of a bargain and sale to them the said Thomas Bouns and David Hutchinson thereof, made by the said John Trench, and by force of the statute for transferring uses into possession, &c., conveyed unto the said Thomas Bouns and David Hutchinson, and the survivor of them, and to the heirs of such survivor, the said lands of Carraine, to hold the said premises unto the said Thomas Bouns and David Hutchinson, and to the survivor of them, and to the heirs of such survivor, for a term of 500 years, without impeachment of waste, to the use of John Trench for life, with power to make leases in possession, with

the consent of the trustees; and, in case there was issue of both the bodies of John Trench and Mary his wife, then to the use of the eldest son for life, with divers limitations over. The deed stated a further use to be, that the intended wife should have a jointure of £50 per annum, and a further use that the said trustees should receive or borrow, by sale or mortgage, or other lawful means, any sum or sums of money that they, or either of them, the said Thomas Bouns, David Hutchinson, John Trench or Mary his intended wife, should think prudent, for the portions of younger children of the marriage, not exceeding the sum of £800, to be disposed of among such younger children in such shares as the said John Trench should, by his will or other instrument in writing, with the formalities therein prescribed, direct or appoint; and, in default of such appointment by the said John Trench, as the said intended wife should in like manner appoint. The deed contained a covenant to levy a fine, or suffer a recovery, and for further assurance. This covenant was not acted on; no fine was ever levied, or recovery suffered; nor was any disentailing assurance executed by John Trench, or any other persons claiming under the entail. There was no indorsement of livery; the deed was not enrolled, and the trustees did not appear to have entered into or been in possession of the lands. It was, however, registered in 1804.

John Trench died in 1848. There was issue of the marriage, two sons and three daughters. The younger son and one daughter died in the father's lifetime; the eldest son, Hubert, came of age in 1837, and died in 1853. During the interval between 1829 and 1833, John and Hubert respectively confessed several separate judgments, for various sums, to different persons. No question arose on the Statute of Limitations or Re-docketting Acts, respecting the judgments which were still unsatisfied. In 1834, on Hubert's marriage, John and Hubert, by a deed of the 2nd of March 1834, granted to George Ruttledge and Henry Jordan, for a term of 500 years, the said lands of Carraine, then in the actual possession of the latter, by virtue of a lease for a year, to hold to the said George Ruttledge and Henry Jordan, their executors,

E. T. 1856.
*Common Pleas*
*In re*
TRENCH.

administrators and assigns, to the following uses; that is to say, subject to the jointure for John's wife, and the payment of the said sum of £800, to permit Hubert to receive the issues and profits of three-fourths of the estate, and John to receive the rents of one-fourth, during their respective lives, with a right of survivorship to Hubert as to that one-fourth, with power to Hubert to make leases; and, after Hubert's decease, and in case there should be issue male of said marriage, to the use of the eldest son for life, and, after his decease, to the use of such lawful issue as he may have, according to priority of birth, with limitations over, very like those in the deed of 1804; to the use also that Maria Jordan, the intended wife, should have a jointure of £500 per annum; and also to the use that the said trustees, their heirs, executors, &c., should raise or borrow £800 for younger children, with a power of distribution to Hubert and his wife. This deed, which also contained a covenant to levy a fine, suffer a recovery, and for further assurance, was never registered or enrolled; the trustees do not appear to have ever been in possession. There is issue of this marriage one son, John Trench a minor.

In 1836, John and Hubert, by deed, granted a rentcharge on part of the lands of Carraine, to Martin O'Hara, his executors, &c., in order further to secure certain of the said judgments against John and Hubert, which had vested in him. By virtue of this deed, O'Hara entered into the receipt of the rents; the deed was registered in 1842, and, in the same year, Hubert Trench confessed another judgment to O'Hara. John Trench, previous to his death in 1848, appointed, by deed, the £800 mentioned in the deed of 1804, among his two surviving children. In 1850, Hubert Trench took the benefit of the Insolvent Debtors Act, and the usual judgment was entered up against him, by the provisional assignee, for the sum of £2300, which included the sum of £800 mentioned in the deed of 1804.

Upon this statement, the Commissioners requested the opinion of the Court of Common Pleas upon the following questions:—

Is the judgment obtained in 1828, by the said Martin O'Hara against the said John Trench the elder, a charge on the lands

against John Trench the younger? and can the said lands be now taken in execution under and subject to an *elegit* founded on the said judgment?

Same question, as to the judgment obtained by said Martin O'Hara against said Hubert Trench in 1828.

Same question, as to the judgment obtained by said Martin O'Hara against said Hubert Trench in 1842.

John Trench the younger has elected to take the estates under the deeds of 1804 and 1834, in preference to his title under the old entail, and has entered upon them, making a declaration to that effect. Can he, by such election and declaration, prevent the judgment creditors from taking the lands in execution?

If the lands can be taken in execution, is the creditor subject to the jointure created by the deed of 1804, or the rentcharge of 1834, or either of them?

And if, notwithstanding such election, the said judgments, or any of them, are a charge upon the said lands, are they, or any of them, charged thereon in priority to the deed of settlement of 1804, and the charges created thereby?

*J. E. Walsh* and *P. Blake*, for the judgment creditors.

The question here is, did John Trench take such an estate as was liable to the judgments, under the 22nd section of 3 & 4 *Vic.*, c. 105? That question depends upon the legal operation of the deed of 1804. That deed, if not good as a conveyance by lease and release, was certainly good as a covenant to stand seised: *Doe* d. *Lewis* v. *Davies* (*a*). The word "grant" is sufficient to create a covenant. It will be objected, on the authority of *Hore* v. *Dix* (*b*), that the covenantees were strangers to the consideration; but that case is overruled by *Roe* v. *Tranmarr* (*c*). The deed creates a base fee, which would not merge with the remainder in tail: *Woodroffe* v. *Daniel* (*d*). The base fee descended to Hubert; John was remitted. The doctrine of remitter is set forth in *Co. Lit.*, s. 659, and in

(*a*) 2 M. & W. 503.
(*b*) 2 Sid. 25.
(*c*) 2 Wils. 75; S. C., Willes, 682.
(*d*) 15 M. & W. 786; S. C., 2 H. L. Cas. 831.

E. T. 1856.
*Common Pleas*
*In re*
TRENCH.

*Viner's Abr., Remitter*, K. The effect of the remitter is, that the party takes subject to all incumbrances; the maxim *qui sentit commodum sentire debet et onus* applies. When John, the settlor in the deed of 1804, died in 1848, the estate tail vested in Hubert; that is now an estate tail in possession in John, and is bound by the judgments. The effect of the deed of 1804 was to give the estate tail back to John: *Machell* v. *Clarke* (*a*). The tenant in tail cannot elect whether he will be remitted or not; that is decided in *Woodroffe* v. *Daniel*. Upon Hubert's death, John was remitted, *nolens volens;* and by that remitter all the estates created by John the elder and Hubert were destroyed. The deed of 1834 created no estate of freehold, and had no effect upon the estate tail except to postpone its enjoyment; it passed nothing but the term, which, being carved out of the base fee, was destroyed, together with the base fee. At the death of John the elder, Hubert became entitled to the estate tail. Hubert died in 1853, and John the younger was under age when the estates came to him; he therefore takes an estate *per formam doni*, and, if he was unable to waive it, he takes unaffected by acts of Hubert and John the elder. He cannot waive the remitter; first, because he was under age when the estates came to him; secondly, if a tenant in tail be remitted to a right of action, he can waive it; but if he be remitted to a right of entry, he cannot: *Viner's Abr., Remitter*, N, s. 8 and c. 15; thirdly, he cannot waive where it is to the prejudice of a third party: *Viner's Abr., Remitter*, N, 3; *Co. Lit.*, s. 695. The following authorities were also cited:—*Doe* v. *Saunders* (*b*); *Duncombe* v. *Waighfield* (*c*); *Doe* d. *Cooper* v. *Finch* (*d*); *Machell* v. *Clarke* (*e*).

*J. A. Lawson* and *D. Lynch*, for the guardians of the minor.

The deed of 1804 operated either as a bargain and sale of a term, or as a covenant to stand seised; it might clearly be the latter, according to *Doe* d. *Lewis* v. *Davies* (*f*). The minor claims *per formam doni*. The maxim *qui sentit commodum sentire debet et*

(*a*) 2 Salk. 620.
(*b*) 1 F. & S. 18.
(*c*) Hob. 254.
(*d*) 1 N. & M. 130.
(*e*) 2 Lord Ray. 778; S. C., 7 Mod. 18.
(*f*) 2 M. & W. 503.

*onus* could not apply after the deaths of John the elder and Hubert; for the judgments did not bind their estates. In remitter, the estate must come by descent. In 3 *Cru. Dig.*, p. 316, it is laid down that, "To every remitter there are necessary these incidents, an ancient "right and a new defeasible estate of freehold, uniting in one and the "same person, which defeasible estate must be cast upon the tenant, "not gained by his own act or folly." A party cannot waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself: *Woodroffe* v. *Doe* d. *Daniel* (*a*). They also cited *Bro. Ab., Ac. Pl.*, p. 10; *Cracken* v. *Kelsey* (*b*), and *Massy* v. *Batwell* (*c*).

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MONAHAN, C. J.

T. T. 1856.
*June* 12.

This is a case submitted for our opinion by the Commissioners of the Incumbered Estates Court. The substantial question in the case is, whether certain judgments affect the estate as against the present owner, John Trench jun.? That question arises principally upon, first, the construction, and secondly, the legal operation and effect, of certain deeds.

The first question is, what is the construction and legal operation of the deed of February 1804? The case states that at the time of the execution of this deed, which was a settlement executed upon the marriage of John Trench the elder, the grantor was seised of an estate tail in the lands of Carraine; and being so seised, the deed witnessed that the said John Trench, by virtue of a bargain and sale to the trustees, and by force of the statute for transferring uses into possession, bargained, sold, &c., the lands of Carraine, unto Bouns and Hutchinson, the trustees, to hold the said premises to the trustees and the survivor of them, and to the heirs of such survivor, for a term of 500 years, without impeachment of waste, to the use of John Trench for life, with power to make leases in possession, with the consent of the trustees; and in case there was issue of both the bodies of John Trench and Mary his wife, then to the use of the eldest son for life, with limitations over. There is also a

(*a*) 15 M. & W. 786. (*b*) Sir W. Jones, 60.
(*c*) 4 Dr. & War. 58.

T. T. 1856.
*Common Pleas*
*In re*
TRENCH.

provision in the deed for the jointure of the intended wife, and a power given to the trustees to raise £800 as portions for younger children.

The first question then is, what estate was created by this deed? When this case was first argued before us, it was conceded that the operation of this deed was to create a freehold estate, with certain remainders over, and a naked power to the trustees. It however occurred to the Court that the real question in the case depended upon the legal operation and construction of this deed; and there has been, accordingly, a re-argument for the purpose of ascertaining what estate really passed under this deed of 1804; and it has been contended that it operated as a conveyance by lease and release. We think, on the authority of *Doe* v. *Saunders* (*a*), that it cannot do so, the lease not being sufficiently recited.

The next question which was argued was, whether this deed could operate as a covenant to stand seised, so as to create a freehold estate? However, as the trustees were not relatives of the parties, there was a difficulty in giving it such a construction as would make it operate as a covenant to stand seised, so as to enure to the other uses of the settlement.

It has been argued, upon the authority of *Doe* d. *Lewis* v. *Davies* (*b*), that notwithstanding the interposition of the trustees, and although they could not take an estate, this deed might, nevertheless, operate as a covenant to stand seised to the use of John Trench for life, with a remainder to his first son for life; and, if there were no other objection to the deed, we think that it might so operate. But we are of opinion, upon a ground which has not, I believe, been suggested at the Bar, that this deed cannot at all operate to grant a freehold estate, for a tenant in tail cannot execute a settlement giving himself an estate for life, with remainder in tail to his issue, to take effect upon the determination of his life estate. That point was decided in *Machell* v. *Clarke* (*c*), where it was held that though a tenant in tail may convey an estate, which possibly may not take effect until after his death, he cannot convey an estate which, by the terms of the instrument, cannot take effect until after his

(*a*) 1 F. & S. 18. (*b*) 2 M. & W. 503.
(*c*) 2 Ld. Ray. 778.

death, and therefore that, although the bargainee, re-lessee or *cestui que use* of a covenant to stand seised, &c., has a base fee, yet, notwithstanding the covenant to stand seised, the settlor still continues tenant in tail. The ground of that decision was, that though the tenant in tail may make such a conveyance as shall be binding on the estate tail until avoided by the issue, still, any conveyance to commence after his death shall be void, if by possibility it may not take effect during his life. Accordingly, if the deed of 1804 could have no operation, except to convey a freehold estate by means of a covenant to stand seised, we would have held that it passed no estate whatever. But having regard to the form of the deed, which contains a limitation to the trustees and their heirs for a term of 500 years, a question arises, whether it comes within the decision in *Baldwin's case* (*a*). We are of opinion that it does come within the reason of that decision. One of the points there decided was, that if a deed purports to convey an estate to A and B, and to heirs of A, to hold to them for 99 years, as livery of seisin is necessary to pass it to the estate in fee, nothing would have passed but an estate at will, if the deed had stopped there; but as an estate for years was limited in the *habendum*, that was good by the delivery of the deed, it appearing to be the intention of the parties that the word "heirs" was void. We are of opinion, therefore, that the deed of 1804 had the effect of creating a term of 500 years, granted by the tenant in tail.

As to the deed of 1834, there can be no doubt, for in it there is no limitation to trustees and their heirs, but an express limitation to the trustees and their executors, for 500 years. Therefore there can be no doubt but that the deed of 1834 created a term of years, even if the deed of 1804 created no estate; but if the deed of 1804 did create a term of 500 years, then the effect of the deed of 1834 was to grant a reversion, and some thirty years having expired in 1834, the deed of 1834 operated as an immediate grant of the reversion. Therefore, in any view of the case, we think that a legal term was created by the deed of 1834, and we also think that a legal term was created by the deed of 1804.

(*a*) 2 Coke Rep. 18.

T. T. 1856.
*Common Pleas*
*In re*
TRENCH.

The next question in this case is, what is the legal effect of a term created by such a tenant in tail as John Trench was at the time of the execution of the deed? It is laid down in *Machell* v. *Clarke*, that if a tenant in tail grants a term not warranted by the enabling statute of *Hen.* 8, to commence immediately, and which may possibly commence during his life, such lease is not void, but voidable only; it creates a voidable term in the lessee or grantee, which, until avoided, continues. There are several passages in *Co. Litt.* to the same effect (*Co. Litt.*, 46 *a* and 46 *b*). We are therefore of opinion that these two terms, being not void, but voidable, continue subsisting terms until some act avoiding them be done. It was then argued that the issue in tail having entered upon the lands, that was a disaffirmance of the pre-existing term. There is no doubt but that if he entered with that object, he had a right to do so; but it is stated in the case that he elected to take the premises under the deeds of 1804 and 1834, and that he entered, claiming to be entitled under those deeds. It may be so; there is certainly some difficulty in knowing which was meant, but we have come to the conclusion that he entered, not asserting any title in himself, adverse to the deeds of 1804 and 1834. He had no legal estate under either deed, but he took a beneficial interest under the deed of 1834. We therefore intend to state in our certificate that we infer from the case that he entered not as claiming an estate vested in himself, but as acting on behalf of the trustees in whom the legal estate was vested. That being our inference of fact, we are of opinion that such entry was no disaffirmance of the terms of either deed. Several passages in *Co. Litt.* show that an entry upon lands has not necessarily the effect of divesting an estate, though the party has a right to enter.*

We are of opinion that if the entry here was in fact not an entry claiming an estate in the man himself, but an entry claiming under the trustees, it had not the effect of annulling this term, but is still valid and subsisting. Then, assuming this to be so, the question still remains, what are the rights of the judgment creditors as against the parties claiming under these terms? The judgments are

* *See* Co. Lit., 49 *b*; also the chapter on Descents.

all subsequent to the deed of 1804, but prior to the deed of 1834, and therefore, *prima facie*, prior to the one and *puisne* to the other. However, we think that all the judgments must be considered as *puisne* to both deeds, and for the following reasons: they were obtained against the tenant in tail of an outstanding term (this is not a case of either remitter or discontinuance). Therefore, during the life of the party against whom they were obtained, they affected his life estate expectant on the term created by the deed of 1804, but prior to the deed of 1834. The 22nd section of Pigot's Act (3 & 4 *Vic.*, c. 105), which first made judgments a charge upon lands, expressly saves the rights of purchasers for valuable consideration before the Act. Now, both the deeds in question being marriage settlements, and persons claiming under them being purchasers for value, in our opinion these judgments have no effect against them. We go no further than the life estate of the present John Trench. One of the uses in the settlement is declared to be for the first son of the marriage; therefore he is a purchaser for value. The legal term is vested in the trustees for his benefit; and if we are right in that, then the judgment creditor has no right as against his life estate. If we are right, the term is a subsisting term during the life of John Trench, and the judgment creditors have no rights as against his life estate. They may have rights as against the reversioners, after the expiration of this term, but it is not necessary for us to consider that question now. We shall therefore certify that, as against the life estate of John Trench, the judgments have no operation.

BALL, J., JACKSON, J., and KROGH, J., concurred.

H. T. 1857.
*Common Pleas.*

## BOURKE *v.* BLAKE.

*Jan.* 20.

A contract, in order to be binding, must be mutual, and capable of being enforced by either party.

A plaintiff cannot maintain an action for breach of contract, where part of the promises to be performed by the defendant is illegal, even though the consideration on the part of the plaintiff is untainted with illegality.

A promise to obtain for another the office of post-master is illegal within the meaning of the 49 *G.* 3, c. 126.

The Court will take judicial cognizance of the meaning of the term 'post-master.'

ACTION for breach of contract.—The first paragraph of the summons and plaint alleged "That the plaintiff was an architect, "civil engineer and land surveyor, resident with his family in "Loughrea, in the county of Galway, and was about to remove "with his said family to Waterville, in the county of Kerry, for "the purpose of setting up in business there, at the request of "certain relations, who had offered to advance, as a gift, a sum "of £250, to enable the plaintiff, &c., to set up in business; and "that the defendant, in February 1854, in consideration that the "plaintiff would not go to and set up business at Waterville, but "would remove from Loughrea and would undertake to become "resident in a certain property of the defendant's, called Bally-"glass, in the county of Mayo, and would undertake to set up "there, in the business of general shop-keeper and hotel-keeper, "in a house to be provided for that purpose by the defendant, "undertook and promised the plaintiff, that he, the said defendant, "would, within a reasonable time, let to the plaintiff, and put "him in possession, as defendant's tenant, of a house at Ballyglass, "with one acre of ground, at the yearly rent of £30; the said "house to be fitted up for such shop and for a hotel, and to "cost the defendant £400; and also, that he, the said defendant, "would, within a reasonable time, let to the plaintiff, and put "him in possession, as tenant to the defendant, of between twenty "and thirty acres of land near Ballyglass, at the rent payable "therefor by the then occupying tenants thereto; and that he, "the said defendant, would give to the plaintiff as long a lease "of his said house as the defendant had power legally to make "thereof; and also that he, the said defendant, would procure "plaintiff to be appointed to the office of post-master at Bally-"glass, when a vacancy should take place in such office, and

"would likewise procure for the plaintiff the appointment of "coach and car agent at Ballyglass. That, confiding in such "promise of the defendant, the plaintiff, at the request of the "defendant, did not go to set up business at Waterville, but "removed with his family from Loughrea to Ballyglass, and "undertook to become resident there, and also undertook to set "up in business in Ballyglass, as a general shop-keeper and "hotel-keeper, in a house to be provided by the defendant; and "that although the plaintiff had always been ready and willing "to perform in all respects the said contract, and that although "the defendant did let to the plaintiff, and did put him in possession "of such one acre of the said lands, and also of certain other twelve "acres of the said lands, portion of the said twenty or thirty acres, "as tenant from year to year, yet the defendant did not, within "a reasonable time after the making of the said contract, or at "any time since, let to the plaintiff, or put him in possession, "as the tenant of the defendant, of any house in Ballyglass fitted "for such shop and hotel; and that although the defendant was "able, legally, to make a lease of the said lands and of a house "at Ballyglass, for his own life or twenty-one years, yet the "said defendant did not give to the plaintiff any lease of such "house, with one acre of ground, or any lease of from twenty "to thirty acres of land for such term as he had power, legally, "to make thereof, although often required so to do; and that "although a vacancy occurred in the office of post-master, at "Ballyglass, in 1854, yet the said defendant did not procure "the plaintiff to be appointed post-master at Ballyglass, nor "did the defendant procure the plaintiff to be appointed coach "and car agent, although requested so to do, but hath broken "the said promises and the said contract, whereby the plaintiff "hath lost great gains and profit."

Demurrer thereto:—"That the alleged agreement of defendant "to have plaintiff appointed as post-master, as in said paragraph "stated, is part of the entire consideration for the contract in "said paragraph stated, and is void at law, as being contrary "to public policy, and is contrary to the statute in that case

H. T. 1857.
*Common Pleas.*
BOURKE
*v.*
BLAKE.

"made and provided, and therefore renders the said contract "invalid, and not binding on defendant, so as to render the de-"fendant liable for the breach thereof."

*G. O'Malley* and *Walter Bourke*, for the demurrer.

This contract is treated in the summons and plaint as one entire contract. One of the promises to be performed by the defendant, namely, the promise to obtain for the plaintiff the office of post-master of Ballyglass, is illegal; therefore, the entire contract is void, and the plaintiff cannot maintain his action. The 1 *Vic.*, c. 33, s. 9, enacts, "That the Post-master General "may appoint sufficient deputies, agents and servants under him, "for the better managing the Post-office revenue, at the several "places within the United Kingdom, and other Her Majesty's "dominions, where post or post communications shall be estab-"lished." The 13th section enacts that the moneys arising from the duties granted by the Post-office Acts shall be paid into the receipt of Her Majesty's Exchequer, and made part of the Consolidated Fund of the United Kingdom. The 15th section provides that there may be reciprocal application of the revenues of the British and Irish Post-offices to the service of each other. The 5 & 6 *Ed.* 6, c. 16 (*Eng.*), was an Act "against the buying and selling of offices." The 49 *G.* 3, c. 126, s. 1, extended the last mentioned Act to Ireland. Section 3 enacted that any person who shall buy or sell, or pay, or receive, any money, gratuity, profit or reward, directly or indirectly, for offices, shall be deemed guilty of a misdemeanour. Section 4 enacts, that if any person shall pay or receive any money, gratuity, reward or profit, directly or indirectly, for soliciting or obtaining offices, he shall be deemed guilty of a misdemeanour. The defendant here promised that, in consideration of the plaintiff's coming to reside at Ballyglass, and setting up in business there, &c., he, the said defendant, would obtain for the plaintiff the office of post-master. That promise was clearly illegal, under the Acts just cited; and it was part of the entire contract, therefore, the contract was void. It was also void at Common Law, as being contrary to public

policy: *Morris* v. *M'Cullock* (*a*); *Harrington* v. *Du Chatel* (*b*).—[MONAHAN, C. J. We have no doubt that, under statute or at Common Law, a contract to obtain the appointment to such an office is illegal and void. The question is, can this contract be considered as divisible?]

The following authorities were cited:—*Mechelan* v. *Wallace* (*c*); *Thomas* v. *Williams* (*d*); *Law* v. *Law* (*e*); *Hopkins* v. *Prescott* (*f*); *Fetherston* v. *Hutchinson* (*g*); *Waite* v. *Jones* (*h*).

*J. Kernan* and *R. Lane*, for the plaintiff.

This contract is divisible. *Hopkins* v. *Prescott* does not apply. There, the position of the parties was the opposite of that in the present case. Here, the illegality, if any, was on the part of the defendant. There was none on the part of the plaintiff, who may maintain his action against the defendant, even though the latter could not sue him. If there be several breaches, and the consideration for one of them is bad, the plaintiff may recover on the others; *Dawson* v. *Wrench* (*i*); *Morris* v. *Chapman* (*k*). In *Howe* v. *Synge* (*l*), it was held that a deed granting an annuity within the time included, by relation back, in the Property Tax Act, and reciting the agreement for the purchase, at a certain price, of a certain annuity, free from the property or income tax, and covenanting for the payment of it without any deduction in respect of the property or income tax, or other parliamentary taxes, was not void *in toto*, but only to the extent of the agreement for payment without such deduction for property or income tax.

It does not appear on this contract that it was one contravening the 49 *G.* 3, c. 126. That statute contemplated a money payment; and, in the cases cited on the other side, the consideration was money payment; here there was no money payment: neither

(*a*) 1 Amb. 432.
(*b*) 1 B. C. C. 124.
(*c*) 7 A. & E. 49.
(*d*) 10 B. & C. 664.
(*e*) 3 P. W. 391.
(*f*) 4 C. B. 578.
(*g*) Cro. Eliz. 199.
(*h*) 1 Scott, 730.
(*i*) 3 Exch. 359.
(*k*) Thos. Jones Rep. 24.
(*l*) 15 East, 440.

H. T. 1857.
*Common Pleas.*
BOURKE
*v.*
BLAKE.

does there appear on the contract any contemplated profit for the defendant; and the Court will not intend anything to cut down the plaintiff's cause of action. But, in any case, the Act only makes parties entering into contracts which are illegal under the Act guilty of a misdemeanour; it does not make the instruments containing such contract wholly void. If one of two considerations be good, that is sufficient: *Crisp* v. *Gamel* (*a*).—[MONAHAN, C. J. If any portion of an indivisible contract be illegal, it taints the entire contract.]—If an agreement contains a stipulation which can be considered as divisible, and one part is void, although the other is not, effect will be given to the latter, and the agreement will not be held to be altogether void: *Price* v. *Green* (*b*). It is not set out on the pleading, nor can the Court know, what the office of post-master, mentioned in the summons and plaint, means. A post-master might mean a keeper of post-horses, and the Court cannot presume that the office of post-master is within the 49 *G.* 3, c. 126.

The following authorities were also cited:—*Shackell* v. *Razier* (*c*); *M'Allen* v. *Churchill* (*d*); *Chesman* v. *Nainby* (*e*); *Collins* v. *Gwynne* (*f*).

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MONAHAN, C. J.

*Jan.* 31.

This case has created some little difficulty in the mind of the Court. The substance of the action is this:—The plaintiff alleges that, having been resident in Loughrea, he was about to remove to Kerry, at the request of some of his relatives, who had offered to advance some money for the purpose of setting him up in business there; and that, in consideration that the plaintiff would give up his intention of going to Kerry, and would reside in Ballyglass in the county of Mayo, and would promise to become a permanent resident, and to carry on business there, the defendant undertook to do several matters; namely, to build him a house, and to make him a lease of certain lands for the longest term that he could, under the

(*a*) Cro. Jac. 128.
(*b*) 16 M. & W. 346.
(*c*) 3 Scott, 59.
(*d*) 11 Moore, 483.
(*e*) 2 Ld. Ray. 1456.
(*f*) 7 Bing. 423.

tenure by which he himself held his property; and also that he would procure plaintiff to be appointed post-master of Ballyglass, whenever that office should become vacant, and that he would also procure for plaintiff the office of coach and car agent in Ballyglass. The defendant has demurred to the summons and plaint, upon the ground that the action is brought upon one entire contract, and that as one of the matters in the contract is illegal and void, namely, the promise to procure for plaintiff the appointment of post-master, no action can be maintained upon the contract. It has been suggested that it has not been set out on the pleadings, and that the Court cannot know, what the office of post-master is; but we think that there can be no doubt that the post-master in the town meant the person who officially receives the letters when brought into the town by the Government mails, and that that was the situation which the defendant promised to procure for the plaintiff. It was also contended that there would be great difficulty in bringing this case within the Act of 49 *G.* 3, c. 126, because the defendant was not getting any money. We have no doubt whatever but that, as far as the promise to procure the office of post-master for the plaintiff is concerned, this contract is illegal, and that if the action were for breach of that part of the contract, it could not be maintained; but it is urged that, admitting that to be so, still as the contract, consisting of several matters distinct in their nature, is divisible, and as the consideration is not illegal, the plaintiff may maintain his action for the non-performance of the legal part of the contract, though not for that of the illegal part. There is a passage in *Chitty on Contracts*, p. 573 (ed. of 1850), supporting that proposition:—"If a contract be made on several considerations, one of "which is illegal, the whole is void, and that, whether the illegality "be at Common Law or statute. But when the consideration is "tainted by no illegality, and some of the promises only are illegal, "the illegality of these does not communicate itself to or taint the "others, except when, owing to some peculiarity of the contract, its "parts are inseparable."

If the law, thus laid down, be correct and supported by authority, it would, no doubt, afford strong ground for the proposition that the

H. T. 1857.
*Common Pleas.*
BOURKE
*v.*
BLAKE.

plaintiff might maintain his action on the good part of the contract, though not on the bad part, because there was nothing illegal to be done by the plaintiff, and therefore no illegality in the consideration for defendant's promise. We have referred to the authorities upon this point, and find that they all clearly prove that if there be several considerations for a contract, an illegality in any portion, whether separate and distinct or not, of what was done or to be done by the plaintiff, vitiates the contract, and he cannot maintain an action against the defendant, although the act to be done by the defendant may be legal. But it said that the converse is not true. We cannot find any grounds, either in law or sense, for such a distinction, nor any authority for saying, where there is one good consideration and one illegal consideration, that there the plaintiff may maintain an action though the defendant could not. *Chitty* refers to a *dictum* of Chief Justice Tindal in *Shakell* v. *Razier* (*a*), but no such position is there to be found. Chief Justice Tindal certainly does say that there are cases which show that where a promise rests upon two considerations, and one of them is, upon the face of it, impossible or unintelligible, that part may be rejected, and the promise be referred to the other part; but he adds, that in all cases a distinction is to be observed between a consideration which is merely void and one which is illegal. The only case bearing any resemblance to the present is a case which created considerable doubt in my mind; I allude to the case of *M'Allen* v. *Churchill* (*b*). That was a very peculiar case. It was an action of assumpsit for the breach of an agreement. The declaration stated that, by an agreement between the plaintiff and defendant, the latter agreed to assign his interest in the lease of a public-house to the plaintiff, who was to pay all taxes and take the fixtures and stock in trade at a valuation; that the plaintiff agreed to purchase the defendant's interest, and pay for the fixtures on these terms, and that he deposited £300 in part payment of the purchase-money. The breach was, that the defendant had no right to assign the lease, nor any interest in the premises. The plea was the general issue. It appeared at the trial that the agreement contained a clause,

(*a*) 3 Scott, 59. (*b*) 11 Moore, 483.

not set out in the declaration, whereby the defendant agreed that he would not carry on the business of a publican or victualler within five years from the time of making the agreement. The jury found a verdict for the plaintiff, on the ground that the defendant had no right or title to assign the business. On a motion for a new trial, it was objected that the clause in question was in restraint of trade, and therefore illegal; that the clause, being an essential part of the consideration, vitiated the whole contract, and that the entire consideration should have been set out. Best, C. J., in his judgment, said:—"But are we to say that every agreement is wholly bad, "because it happens to contain an illegal clause? In setting out "a contract in a declaration of *assumpsit*, it is only necessary to "state so much of it as contains the entire consideration for the "act, and the entire act which is to be in virtue of such con-"sideration; and it appears to me that the consideration in this case "was sufficiently stated; the clause in question is a superadded or "independent clause: it is a sort of rider, forming no essential "part of the consideration."

As far as I can understand those observations, Chief Justice Best appears to have meant that that particular promise formed no part of the consideration. If by that he meant that the other portion contained the entire contract, then there can be no doubt that he was right in his conclusion; but if he meant that, though this act was to be done, and was an essential part of the contract, the plaintiff could maintain an action though the defendant could not, I can only say that we cannot follow his decision. We think that a contract, in order to be binding, must be mutual, and that, if it cannot be enforced by one party, neither can it by the other. In this particular case the plaintiff was to do certain things which he has done, and he alleges that in consideration of those matters the defendant was to do several things for him. We are of opinion that this was all one entire agreement, and that as one of the promises made by the defendant was illegal, the contract was void. This demurrer must therefore be allowed.

JACKSON, BALL and KEOGH, JJ., concurred.

M. T. 1857.
*Common Pleas.*

## TUITE *v.* HANDCOCK.

*Nov.* 19, 20.

J. M. was arrested by the Sheriff of D., under a *ca. sa.*, at the suit of Hugh M. T., and was thereupon committed, by the Sheriff, to the custody of the Marshal of the Marshalsea, upon a warrant describing the plaintiff as *Henry* M. T. The prisoner having filed a pauper declaration, pursuant to 5 & 6 *Vic.*, c. 95, s. 7, the officer of the prison thereupon furnished a list of detainers to the Insolvent Court, in which the detaining creditor was described as "Henry," and a *Gazette* notice, pursuant to section 8, was published accordingly. Hugh M. T. afterwards applied to the Insolvent Court, for leave to file a creditor's petition, which was refused, upon the ground that he did not appear by the list, as furnished, to be a detaining creditor, and J. M. was accordingly discharged. The plaintiff, in the execution, having sued the Sheriff for breach of duty, whereby the prisoner was discharged from custody:—*Held*, on demurrer, that the Insolvent Court ought to have permitted the actual detaining creditor, upon proof of the misnomer, to have filed a creditor's petition; and that inasmuch as the prisoner's discharge was not the necessary consequence of the Sheriff's mistake, he was not liable to an action.

THIS was an action against the defendant, who was the late High Sheriff of the county of the city of Dublin. The first count of the summons and plaint alleged the recovery by the plaintiff of a judgment in the Court of Common Pleas, against one John Mulligan, for the sum of £30. 18s. 5d., and the delivery to the defendant of a writ of *ca. sa.*, to be executed in due form of law, by which writ, the defendant, so being the Sheriff of the county of the city of Dublin, afterwards, and before the return of said writ, and within his bailiwick, took and arrested the said John Mulligan by his body, and then and there, by virtue of the said writ and of the said indorsement, so made thereon as aforesaid, had and detained him in custody in execution for the said sum so indorsed on the said writ as aforesaid, and had and detained him in his custody from thence until the said defendant, so being the said Sheriff, afterwards, without the leave and licence, and against the will of plaintiff, and not regarding his duty as such Sheriff, &c., &c., committed the said John Mulligan to the custody of the Marshal of the Four-courts Marshalsea, in execution, at the suit of Henry Morgan Tuite, and not of Hugh Morgan Tuite; and thereupon the said John Mulligan did, pursuant to the statute, subscribe, &c., the following declaration —[setting forth the pauper declaration made by the prisoner in the presence of the Deputy-marshal, pursuant to the Act]—and thereupon the said Deputy-marshal did forthwith furnish a list of said detainer, at suit of Henry Morgan Tuite, being the only detainer then lodged with said Sheriff, as appearing against said John

Mulligan, and not including in said list any detainer in the name of the said Hugh M. Tuite, to James Plunket, Esq., Chief Clerk of the Court for the Relief of Insolvent Debtors in Ireland, who filed the same; and forthwith gave notice in the *Dublin Gazette* to Henry Morgan Tuite, so appearing the only detaining creditor of said John Mulligan, that if he did not, within twenty-one days after the publication of said notice, file, or cause to be filed in the said last mentioned Court, at his proper expense, a detainer against said John Mulligan, so as to bring him before the Court for the Relief of Insolvent Debtors in Ireland, for adjudication, the said John Mulligan, in respect of whom said notice was signed, should be entitled to his discharge from Court. That by reason of no committal or detainer, at suit of or in the name of the plaintiff, being lodged by said Sheriff with said Marshal, the said Marshal was unable to include, furnish or return such in said list, or in any other list or otherwise, to said Chief Clerk; and the plaintiff could not, and was not authorised by law, to file or cause to be filed in said Court a petition against Mulligan, so as to bring him before said Court for adjudication, pursuant to said statute as aforesaid. That afterwards, and before the expiration of twenty-one days from the publication of the said notice in the said *Gazette*, the plaintiff, by his proper name of Hugh Morgan Tuite, applied to said Court for liberty to file a petition against Mulligan, so as to bring him before the said Court; but said Court refused such liberty, and adjudicated and determined that no detainer in the name of said Hugh Morgan Tuite appearing on the list of detainers furnished by said Marshal as aforesaid, said Hugh Morgan Tuite was not entitled to file any such petition as aforesaid; and afterwards the same Chief Clerk made out his discharge for said Mulligan, and forwarded the same to the said Marshal, and thereupon said Mulligan was discharged from the said custody of said Sheriff, and permitted and suffered to escape and go at large whenever he would get out of the custody of the Sheriff and of the said Marshal he, the defendant, then being Sheriff of the county of the city of Dublin, and the said sum so indorsed on the said writ being then and still wholly unpaid; by reason of which said premises the

M. T. 1857.
*Common Pleas.*
TUITE
*v.*
HANDCOCK.

plaintiff is greatly injured and hindered of the due and just means of having the said sum so adjudged to him, and is very likely to lose the same.

The defendant demurred to the first paragraph of the summons and plaint, because no sufficient ground in law was alleged therein, for the plaintiff not filing the petition for the purpose of bringing the said Mulligan before the Court for adjudication, nor for the discharge of Mulligan from custody under said writ; that it was not shown that Mulligan was legally discharged from custody under said writ; that it was neither shown nor alleged that such discharge out of custody was the legal consequence of any act of the defendant; and that, for all that appeared to the contrary, the plaintiff, as detaining creditor of Mulligan, was entitled to file a petition against him, so as to bring him before the Insolvent Debtors Court for adjudication.

*Norman* (with whom was *Hayes*), in support of the demurrer.

The prisoner Mulligan was in legal custody, under the *ca. sa.*, at the suit of Hugh Morgan Tuite, who was the detaining creditor, and his discharge was owing to the judicial mistake of the Insolvent Court: *Williams* v. *Lewis* (*a*); *Page* v. *Williams* (*b*); *Rose* v. *Tomlinson* (*c*); *Rex* v. *Fowler* (*d*). The prisoner, whilst in the Marshalsea, was still in the custody of the Sheriff under the writ, although the Sheriff's liability for an escape determines by the committal of the prisoner to the custody of the Marshal: *Ex parte Higgins* (*e*); 5 & 6 *Vic.*, c. 95, ss. 1, 7, 8.

*Dames* and *G. Battersby*, contra.

The discharge of the prisoner was attributable to the mistake in the warrrant, which was the fault of the Sheriff. The order of the Insolvent Court was right, because they had nothing to look to but the list of detainers furnished by the Marshal. The pro-

(*a*) 1 Chitty Rep. 611.
(*b*) 1 Ir. Com. Law Rep. 499.
(*c*) 3 Dowl. P. C. 49.
(*d*) 1 Ld. Ray. 586.
(*e*) 9 Ir. Law Rep. 414.

visions of the 7th section would be useless if a party were permitted to impeach the list. The Marshal, on the other hand, prepared the list in conformity with the warrant; and when he received the order of discharge, he was bound to act on it, notwithstanding any detainer lodged with the Sheriff: *Ex parte Staunton* (*a*). It is the Marshal, and not the Sheriff, who has the prisoner in custody: *Lamphier* v. ——— (*b*). Where the plaintiff has sustained, as here, a positive injury from the act of the Sheriff, the latter is responsible: *Williams* v. *Mostyn* (*c*); *Arden* v. *Goodacre* (*d*).

*Hayes*, in reply.

The Insolvent Court ought to have allowed evidence to be given, by the plaintiff, to show that he was in fact the party at whose suit Mulligan was in custody, and that there was a misnomer in the warrant. The Sheriff is not to be rendered liable for an error of the Insolvent Court.

*Cur. ad. vult.*

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MONAHAN, C. J.

*Nov.* 20.

This was an action against the defendant, Mr. Handcock, for a breach of his duty, as Sheriff of the county of the city of Dublin. It appears that the plaintiff obtained judgment in this Court against a person named Mulligan, upon which Mulligan was arrested, and was committed to the custody of the Marshal of the Marshalsea of the city of Dublin. Both the execution and the judgment, upon which it was founded, were perfectly regular. The party was arrested by the Sheriff, and was committed by his warrant to the custody of the Marshal; but by mistake, the Sheriff described in the warrant the name of the plaintiff in the action as "Henry," instead of "Hugh" Morgan Tuite, and therefore, so far as the Marshal was concerned, Mulligan was in custody at the suit of a person named Henry Morgan Tuite, no such person being in existence. In this state of facts, in pursuance of the Act of Parliament, 5 & 6 *Vic.*, c. 95, which regulates the Four-courts Marshalsea, Mulligan,

(*a*) 5 Ir. Law Rep. 581.
(*b*) 2 Ir. Jur. 291.
(*c*) 4 M. & W. 145.
(*d*) 11 C. B. 883.

M. T. 1857.
*Common Pleas.*
TUITE
*v.*
HANDCOCK.

requiring the pauper allowance, made the declaration required by the 7th section of the Act; and thereupon, by the 8th section it was required, "That the Marshal, or his deputy, should forthwith furnish the said declaration, or a copy thereof, with a list of the detainers against such person, who shall have subscribed such declaration, to the Chief Clerk of the Court for the Relief of Insolvent Debtors in Ireland, who shall file the same, and give notice in the *Dublin Gazette* to the detaining creditors of the said persons, who shall have subscribed such declaration, that if they, the said detaining creditors, or some one of them, shall not, within twenty-one days after the publication of the said notice in said *Gazette*, file, or cause to be filed, in the said last mentioned Court, at his or their proper expense, a petition against the said person, so as to bring him before the Court for the Relief of Insolvent Debtors in Ireland, for adjudication, the person in respect of whom such notice shall have been given shall be entitled to his discharge from custody."

Now it appears that, in consequence of this mistake, which was made by the Sheriff in the warrant, the Marshal furnished the name of this party to the Chief Clerk in the mistaken way, and the plaintiff then endeavoured to present a petition within the twenty-one days required by the statute, to the Insolvent Court, for the purpose of having Mulligan brought within the provisions of the Act of Parliament. The injury of which the plaintiff complains is, that the late Judge of the Insolvent Court thought that he could not receive the petition of Hugh, because the list contains the name of *Henry* Morgan Tuite. We think that there was a miscarriage on the part of the Insolvent Court; that any person, who, at the time, was a detaining creditor, comes within the Act; that Hugh Morgan Tuite was a detaining creditor; and that in case an application had been made by this party to be discharged, upon the ground that he was in improper custody, the Court would have refused such an application, inasmuch as Hugh Morgan Tuite was the detaining creditor. Any person, who was a detaining creditor, had a right to present a petition, and there was no difficulty in the Judge of the Court ascertaining whether the Hugh Morgan

M. T. 1857.
*Common Pleas.*
TUITE
v.
HANDCOCK.

Tuite, called in the list Henry, was or was not a detaining creditor. In an action of this description, it is necessary to show that some damage accrued to the plaintiff from the act of the defendant, but no such damage is here shown, the thing complained of having been a mere miscarriage. We must, therefore, allow the demurrer.

I may add, that we think, that if the Judge of the Insolvent Court had had the same assistance as we have had, he would not have fallen into this error.

Demurrer allowed.

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## THE LONDONDERRY STEAM-BOAT COMPANY (Limited)
*v.*
## MIDDLETON and POLLEXFEN.

T. T. 1857.
*June 6.*

An agreement for the hiring of a steam vessel for a certain period, at a certain sum, payable weekly, for the carriage of passengers and goods, not under seal, is within the provisions of 5 & 6 *Vic.*, c. 82, although strictly not a charter-party; and requires a 5s. stamp. The provisions of section 34 of the Common Law Procedure Act (1856) relative to the stamping of documents at the trial, only apply to such documents as might have been stamped in the ordinary way up to that period.

THIS was an action upon a charter-party. The summons and plaint set forth a special agreement between the defendants and S. Gilliland, the managing director of the plaintiffs, as contained in an instrument of agreement, which was in the following form:— "Memorandum of agreement, made the 20th day of October 1856, "between Samuel Gilliland, managing director of the Londonderry Steam-boat Company (limited), the owners of the steamer 'Lyra,' "whereof Mathew Hay is master, of the one part, and Messrs. "Middleton and Pollexfen, of Sligo, of the other part, as follows:— "The said Middleton and Pollexfen agree to hire, on and from the "27th day of October, for the period of three calendar months (say "three), the said steamer 'Lyra,' and to pay after the rate of £110 "sterling per week of seven days, and so on in proportion for any "less period than a week, for such time, to the said Samuel Gilli-"land, on the first day of each calendar month. That the said "steamer shall only ply between Sligo and Liverpool, or Glasgow,

T. T. 1857.
*Common Pleas.*
LONDONDERRY STEAM-BOAT CO. *v.* MIDDLETON

"making one voyage to either place in each week, carrying passen-
"gers, cattle and general cargo; such cargo not exceeding what the
"said steamer can reasonably carry and stow, over and above cabin,
"tackle, coals, provisions and furniture, including a reasonable
"deck-load, according to the state of the weather and approval of
"the master. That the said Middleton and Pollexfen shall be
"responsible for improper stowage of goods, and for any loss
"that may arise or be incurred, or occasioned by or to passengers,
"merchandise or cattle which they may put to or on board the
"said steamer, or for taking on board a greater number of
"passengers than allowed by law.

"That the Londonderry Steam-boat Company (limited) shall
"pay all expenses incurred for repairs to hull or machinery during
"the continuance of this charter, and shall be entitled to receive
"reasonable compensation for any extra services performed. That
"in case the vessel is sold during the continuance of this charter,
"the said Londonderry Steam-boat Company (limited) shall have
"liberty to terminate this agreement, on giving one month's notice
"to the charterers. It is further agreed that, in the event of the
"charterers keeping the steamer for six months, the rate of charter
"shall be £100 per week from the commencement of this charter;
"and that, in the event of the owners putting an end to the charter,
"the rate shall be £100 per week. It is further agreed that in
"case the steamer 'Lyra' should be disabled as to her hull,
"machinery or tackle, and thereby prevented from further service
"during the continuance of this agreement, thereupon, upon such
"accident, this agreement shall be void and at an end, save only for
"the purpose of enforcing payment of all the moneys due, and
"which shall thereupon become payable, by the said Middleton and
"Pollexfen; but if the said damage is only such as can be repaired
"without causing the delay of one month, this agreement shall be
"suspended until such damage shall be repaired, and the steamer
"ready to proceed again.—Witness their hands this 20th of October
"1856."—[Signed by the parties.]

The summons and plaint also contained the common counts. The defendants traversed the making of the special agreement, and also

the allegations in the common counts, and pleaded besides a set-off. The plaintiffs replied, traversing the defendants' plea of set-off.

The action was tried before the Lord Chief Baron, at the last Assizes for the county of Antrim, and the plaintiffs offered to read in evidence the above memorandum of agreement, which bore a 2s. 6d. stamp; but the defendants' Counsel objected, upon the ground that the instrument should have had a 5s. stamp. The plaintiffs' Counsel then claimed to be entitled to pay to the Registrar the full stamp-duty, together with the penalty, under the provisions of 19 & 20 *Vic.*, c. 102; to which it was objected that the period within which the instrument should have been stamped having elapsed, the stamp-duty and penalty could not be received at the trial.

The learned Judge stated that it was his impression that the document had not been properly stamped, and therefore was not receivable in evidence; but declined to conclude the plaintiff on account of his impression upon the point, and therefore allowed the instrument to be read in evidence, reserving to the Court above the question as to the admissibility of the document, with permission to the defendant to enter a nonsuit in case they should be of opinion that the stamp was insufficient.

The jury found a verdict of £736. 18s. 10d. for the plaintiffs.

A conditional order having been obtained to enter a nonsuit, pursuant to leave reserved—

*S. B. Miller* was called upon by the Court, in support of the conditional order. He referred to 5 & 6 *Vic.*, c. 82, s. 34; 19 & 20 *Vic.*, c. 102, ss. 34, 35.

*Joy* and *D. M'Causland*, contra, cited *Siordet* v. *Kuczynski* (*a*); *Tattersall* v. *Fearnley* (*b*); *Paul* v. *Birch* (*c*); *Tomkins* v. *Ashby* (*d*); 5 *G.* 3, c. 35, s. 10; 13 & 14 *Vic.*, c. 97, s. 12.

*Harrison*, in reply, cited *Abbott on Shipping*, p. 201 (10th ed.); *Roderick* v *Hovil* (*e*).

(*a*) 17 Com. B. 251.
(*b*) 17 Com. B. 368.
(*c*) 2 Atk. 621.
(*d*) 6 B. & C. 541.
(*e*) 8 Camp. 103.

T. T. 1857.
*Common Pleas.*
LONDONDERRY STEAMBOAT CO. *v.* MIDDLETON

MONAHAN, C. J., delivered the judgment of the Court.

We do not conceive it necessary that this case should stand for judgment. A charter-party we consider to be an instrument for the hiring of a vessel for one voyage, or for a limited time; and, therefore, although this agreement may not strictly come within that description, yet, looking to the Act of Parliament, we are of opinion that this agreement comes within its provisions. The words of the statute (5 & 6 *Vic.*, c. 82), as they are given in the schedule, are:—"Charter-party, or any agreement or contract for the charter "of any ship or vessel, or any memorandum, letter or other writing "between the captain, master or owner of any ship or vessel and "any other person, for or relating to the freight or conveyance "of any money, goods or effects on board of such ship or vessel;" and a distinction appears to be taken between a charter-party and an agreement on the part of the owner of the vessel to carry goods or effects from one place to another for hire. Therefore, from the terms of this instrument, which state that the defendants agreed to hire this vessel for the carrying of passengers, cattle and general cargo, we are of opinion that it comes within the words of the Act, although not a charter-party, and consequently that it should have borne a 5s. stamp. The other question in the case is important. We do not think that the Legislature intended by the provisions of the Common Law Procedure Act to repeal the former statutes, which were passed for the purpose of raising a revenue for the purposes of the State, and were therefore beneficial Acts, and required that the instrument in question should bear a certain stamp. These Acts also provided that some instruments should be stamped at the time they were executed, and others within a short period of time after execution, and, if not stamped within that time, that they could not be stamped at all; and the argument now is, that the Common Law Procedure Act, which is altogether unconnected with the revenue of the country, repeals those enactments, and provides instead, that certain instruments, which under the former Acts of Parliament could only have been stamped within a certain period after execution, may now be stamped at any time they may be required, on payment of a certain

penalty, and an additional sum to the officer for his trouble. We are of opinion that the intention and effect of the latter Act was merely to substitute for the officer of the Stamp-office the officer of the Court in which the trial is proceeding, and that it was not intended to repeal the provision of the Stamp Act, which required certain instruments to be stamped within a certain time after execution; and therefore we are of opinion that such instruments can only be received in evidence at the trial in cases where they might at that period have been stamped at the Stamp-office. We therefore think that the opinion expressed at the trial by the Chief Baron was correct, and that this instrument could not have been received in evidence, on account of the want of a proper stamp; and therefore that a nonsuit should be entered.

Nonsuit entered.

M. T. 1857.
*Exch. Cham.*

## Exchequer Chamber.*

[REGISTRY APPEALS.]

### SHEANE, *Appellant*; POWER, *Respondent*.

*Dec.* 11.

Three persons were the joint owners and occupiers of premises in the borough of Carlow, rated at the annual value of £35. Two of these were not rated for the premises, but the claimant to register was rated for the whole.—*Held*, that the claimant was entitled to be registered, though the other joint occupiers were not on the rate-book.

THIS was an appeal from the decision of the Assistant-Barrister of the county of Carlow.

The name of Samuel Sheane appeared on the list No. 7, published by the Town-clerk, of persons entitled to vote as rated occupiers of premises of the net annual value of £8 and upwards. A notice of objection was proved on the part of Patrick Power. Samuel Sheane appeared in support of his qualification; and it appeared that he and two others were the joint owners and occupiers of the premises in question, which were of the rated annual value of £35; but neither of the two joint owners and occupiers was rated for the premises. The Barrister disallowed the claim of Mr. Sheane, inasmuch as he was not in exclusive occupation of the premises for which he was rated, and his joint occupiers were not rated. If the Court should be of opinion that the fact of not being in exclusive occupation of the rated premises did not disqualify Mr. Sheane, his name was to be inserted on the register; if not, it was to be struck off.

*Charles Andrews* and *Napier*, for the appellant.

Sheane is on the list of rated occupiers, at a sum of £35 per annum; and it is contended, because the two other persons who hold jointly with him are not on the rate-book, that Sheane is to be disqualified.—[PENNEFATHER, B. The sum of £35 would qualify the three.]—Of course, as £8 for each is sufficient; to be registered, no doubt, a person must be rated, but the fact of being rated is not one of the matters on which the rate-book is

* *Coram* PENNEFATHER, B., RICHARDS, B., GREENE, B., and BALL, J.

conclusive.—[BALL, J. There is no joint rating.]—No; but there is a joint occupation; and the sum of £35, divided by three, leaves a sufficient qualification for one. The 13 & 14 *Vic.*, c. 69, s. 5, prescribes the qualification for single occupiers of lands or premises to be a rating to the poor of the net annual value of £8 or upwards, to enable them to vote at elections for cities and boroughs; and the 6th section provides for joint occupiers:—"When any lands, "tenements or hereditaments as aforesaid, within any such city, "town or borough, shall be jointly occupied by more persons than "one, as tenants or owners thereof, and such persons shall be "rated in such rate, as last aforesaid, jointly in respect of such "premises, each of such persons shall, subject to the conditions "hereinbefore provided as to a person occupying lands, tenements "or hereditaments in any such city, &c., be entitled to vote, &c., "in case the net annual value of such premises, as appearing on "such rate, when divided by the number of persons rated jointly in "respect thereof, shall give a net annual value of £8 or upwards for "each of such persons, but not otherwise." The words "each of such persons" refer to joint occupation: *Alexander's case* (*a*). The form of rating is conclusive as to the rate, but the names of persons and things are left open to proof, and so the rate-book is not conclusive as to whether the rating be joint or separate. The 108th section of 13 & 14 *Vic.* says, the rate-books shall be *prima facie* evidence of the matters entered or stated therein; but any person having duly served a notice may prove by evidence that any of the entries therein is untrue or incorrect, except the statements as to the value of the tenements, as to which the rate-books are conclusive, *Meyler's case* (*b*); *M'Dowell's case* (*c*).—[PENNEFATHER, B. The premises being valued at £35 per annum, each person if rated (there being three occupiers) would have a right to vote; how can it be be said that one of the three is disqualified, because the other two are not on the rate?—RICHARDS, B. That 6th section was enacted to prevent a party being deprived of the franchise because of a joint rating.]

(*a*) 5 Ir. Com. Law Rep. 43. (*b*) 5 Ir. Com. Law Rep. 54.

(*c*) 6 Ir. Com. Law Rep. 434.

M. T. 1857.
*Exch. Cham.*
SHEANE'S CASE.

*O'Driscoll* and *David Lynch*, contra.

The occupation must be co-extensive with the rating. Under the Reform Bill, joint occupiers could not vote; here these three persons are joint tenants. That 6th section was to do away with the injustice of preventing parties occupying jointly not being entitled to vote; but it requires that the joint occupation should be on a single rating, that there must be an occupation co-extensive with the rating.—[PENNEFATHER, B. That is an assumption, for the statute does not say so.]—It says, "in case the net annual "value, &c., as appearing on such rate, when divided by the number "of persons rated jointly in respect thereof," &c. The number of persons is the test; and to give Sheane the right, the other two persons should have claimed with him. Sheane may occupy a cellar, whilst the others may occupy the valuable part of the premises; it should be shown what he does occupy, and what his co-tenants are rated at.—[RICHARDS, B. This is a joint occupation of the whole.]—If there be a joint rating, there are in the statute the elements for arriving at the value, by dividing the value of the premises by the number of the occupiers; but if parol evidence be given of the value of the premises, it might be shown that Sheane was not entitled to vote, because there might be six occupiers.—[PENNEFATHER, B. Within the equity of the 6th section, Sheane has plainly a right to vote; you therefore are bound to show that every occupier must be rated before one can vote.]—There must be a continuing occupation of the entire premises. This case does not come within the 5th section, and the 6th is the only one on which it can be argued.—[RICHARDS, B. If the 5th section dealt with a sole, exclusive occupation, in contrast with a joint one, it would be material to your argument.]—It contemplates one occupier; it says, "every male person who shall occupy as tenant or owner."—[PENNEFATHER, B. But look to the 6th section, where it says, "each of such persons."—GREENE, B. If there be a joint rating, under the 6th section, every occupier having the requisite amount is entitled to the franchise.]—The 5th section provides for an occupation by the occupier of rated premises; and if the occupier be not entitled under that 5th section, then the 6th section

does not aid him, for it is conversant with joint occupiers.—[BALL, J. The interpretation clause (117th section) says:—"Every word "importing the singular number only shall extend and be applied "to several persons and things, and every word importing the "plural number shall extend and be applied to one person or thing, "as well as several persons or things." You say the 5th section only applies to a single occupier, and is not that objection met by the interpretation clause?—RICHARDS, B. The objection is, there has not been a joint rating, and therefore the case does not fall within the terms of the 6th section.—PENNEFATHER, B. The section does not say that occupation and rating must be co-extensive—a man may occupy *per my* and *per tout;* the point is quite untenable.—BALL, J. The 108th section confines the conclusiveness of the rate-book to the single matter of value, but it does not shut out inquiry as to the number of occupiers; the record is not conclusive as to that.]

*Napier* was not called on.

*Per Curiam.*

Reverse the decision of the Assistant-Barrister.

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## HUGHES, *Appellant;* BARNETT, *Respondent.*

*Dec.* 11.

The name of a claimant was published in the list of the Clerk of the Peace, of claimants entitled to be registered and to vote in the election of County Members. An objection being duly made to his name appearing on the list, the claimant proved his qualification before the Assistant-Barrister, but admitted that the signature to his notice of claim was not in his handwriting.—*Held*, that the Barrister had no jurisdiction to inquire into the validity of the notice of claim to the Clerk of the Peace, the name of the claimant being returned to him as a claimant on the list.

THIS was an appeal from the decision of the Assistant-Barrister of the county of Carlow.

The name of the Rev. John Barnett appeared on the list of

M. T. 1857.
*Exch. Cham.*
BARNETT'S CASE.

claimants published by the Clerk of the Peace for the county of Carlow, of persons claiming to be on the register for the county, in respect of property in the barony of Carlow. A notice of objection having been served on him, the claimant proved his qualification as a £20 freeholder, but admitted that the signature to the notice of claim sent in by him was not in his handwriting. It was objected that the notice so sent in to the Clerk of the Peace was bad, not being signed in his handwriting by the claimant. The Barrister was of opinion this was a question for the Clerk of the Peace, not for him; and that the Clerk of the Peace having received the claim and entered it on his list, his (the Barrister's) duty, under the 55th section of 13 & 14 *Vic.*, c. 69, was but to require the claimant to prove that, on the 20th of July last, he was entitled to have his name inserted in the list of voters, in respect of the qualification described in the list laid before him by the Clerk of the Peace, and that he had no jurisdiction to inquire as to whether he had sent in a proper claim to the Clerk of the Peace, on or before the 4th of August, the name being returned on the list before him as a claimant. The Barrister therefore overruled the objection, and inserted the claimant's name on the register.

The case submitted that, "If the Court shall be of opinion that "I ought to have entertained the question, and also that the claim "was bad, not having been signed by the claimant, the name of the "Rev. John Barnett is to be struck off the register; on the other "hand, if the Court agree with the view I took, the name is to "be retained."

*O'Driscoll* and *David Lynch*, for the appellant.

[RICHARDS, B. The question in this case seems to depend on 13 & 14 *Vic.*, c. 69, s. 55, defining the duties of the Barrister in revising the lists.]—We think it rests on the 22nd & 34th sections read together; the 22nd section directs that the Clerk of the Peace shall give annually a notice, having first signed the same, requiring all persons entitled to vote, who shall not be on the register, and all persons entitled to vote, whose qualifications may have changed, to deliver or send to his office a notice in writing, by them signed,

of their claim to vote, according to a form of notice in the schedule; and the Clerk of the Peace is then, on or before the 20th of July in every year, to publish a notice, having first signed the same, requiring them, on or before the 4th of August, to give or send a notice in writing to him, of their claim to vote.

Then the 34th section enacts, "That every person whose name "shall have been omitted in any such list of voters, &c., so to be "made out as aforesaid, &c., and who shall claim as having been "entitled, on the 20th of July then next preceding, &c., to have his "name inserted, &c., shall give or cause to be given to the Town-"clerk, &c., a notice according to the form, &c.; and in every such list, "the Christian-name and surname of every claimant, with the place "of his abode, the nature of his qualification, and the local or other "description of the property shall be inserted as the same are stated "in the claim; and the said Town-clerk, if he shall have reasonable "cause to believe that any person whose name shall appear in such "list of claimants is not entitled to have his name upon the register "then next to be made, shall add, as aforesaid, the word 'objected,' "before the name of every such person, on the margin of such list of "claimants," &c., and shall publish such lists.—[RICHARDS, B. Is it open to the Revising Barrister to go behind the return of the Clerk of the Peace, for he says he is precluded; but does not the 55th section give him a large power to correct mistakes in the lists, and to expunge and insert names? If a person were put on the list, and no notice of claim served, would not that be a mistake?]—But the claimant must himself sign the notice of claim: *Toms, appellant; Cuming, respondent* (*a*).—[PENNEFATHER, B. What inconvenience is there in giving to the Clerk of the Peace or the Town-clerk this jurisdiction?—RICHARDS, B. In England it is given to the overseers of the poor; I would have thought the Clerk of the Peace a mere ministerial officer.]—He often performs duties by deputy.—[GREENE, B. A notice of objection is for the Barrister to decide upon, but the Clerk of the Peace is to deal with the notice of claim.—RICHARDS, B. Is the Clerk of the Peace to hold a Court to decide these various matters?]—The duties of overseers in

(*a*) 7 M. & G. 88.

M. T. 1857.
*Exch. Cham.*
BARNETT'S CASE.

England, and of Clerks of the Peace in Ireland, are very different.—[BALL, J. Does not the Clerk of the Peace make out a list, and in so doing does he not decide on the notices sent in to him?]

*H. C. Leslie* and *Napier*, contra.

The Assistant-Barrister's duty is pointed out by the 55th section, as to revising and amending the lists; but he can go no further than inquire into the qualification of the objectors to a claim; he cannot enter into the preliminary matters, which must be decided elsewhere. Overseers in England, by 6 *Vic.*, c. 18, s. 4, have analogous duties to those prescribed for Clerks of the Peace in the 22nd section of 13 & 14 *Vic.*, c. 69; and the 5th section of 6 *Vic.*, c. 18, directs the same things as the 23rd section of 13 & 14 *Vic.*, c. 69, to prepare lists of claimants and make objections: as to these matters, the Clerk of the Peace is the arbiter, and the Barrister cannot go behind his return. Then, as to the signature not being in Mr. Barnett's writing, under the Statute of Wills it has been held that the mark of a testator is sufficient; many people cannot even write their names, from disability or some other physical cause: *Baker* v. *Dening* (*a*). In *Davies* v. *Hopkins* (*b*), the precise point has been ruled; where the name of a person inserted in a list of claimants for a county is objected to, proof ought not to be required, that the person objected to had given due notice of his claim to the overseers. Cockburn, C. J., says:—"It appears to me that the matter, "in the first instance, is merely between the claimant and the over-"seer; and, if the overseer, being satisfied that the notice is signed "by the claimant himself, or authorised by him, and that it is "therefore intended, at all events, to be in compliance with the "Act, chooses to put the name on the list of claimants (which, "together with the copy of the old register, is to be deemed to be "the list so revised), in such case, it seems to me that the Revising "Barrister has nothing further to consider, than whether the voter "makes out that he was entitled, with respect to the qualification "described in the list."—[PENNEFATHER, B. That case is quite in

(*a*) 8 Ad. & El. 97. (*b*) 27 Law Jour., C. P., 6.

point, and is conclusive on the question of the jurisdiction of the Clerk of the Peace.]

*Lynch* replied.

The practice of the Revising Barristers has been to inquire into these matters, notwithstanding the notice of claim sent in by the Clerk of the Peace. It is the validity of the claim on which the Barrister has to decide; and the circumstances connected with it, and the signature of the claimant, are especially within his jurisdiction. The 56th section of 13 & 14 *Vic.*, c. 69, gives him large powers: "and every such Barrister shall, upon the hearing in "open Court, finally determine upon the validity of such claims "and objections."—[PENNEFATHER, B. But the validity of the claim has nothing to do with the way the claim is made.]—The 48th section shows that the Legislature intended the original notices to be dealt with: *Booth* v. *Moffett* (*a*).—[RICHARDS, B. The Court there entertained the preliminary question, but it did not decide the point raised here.—GREENE, B. Is there any distinction between the English statute, 6 *Vic.*, c. 18, and the Irish Act, 13 & 14 *Vic.*, c. 69, on this head?]—Overseers in England have other duties than Clerks of the Peace; they send the claims to the Clerk of the Peace; and the machinery for carrying out the purposes of the Act is entirely dissimilar. It would be strange to assume that the Clerk of the Peace was familiar with the handwriting of a whole county: *Godsell* v. *Innous* (*b*).

PENNEFATHER, B.

We are of opinion that the case of *Davies* v. *Hopkins* settles the question; it is directly in point, for there is no substantial distinction between the duties of overseers in England and Clerks of the Peace in Ireland, as to notices of claim.

RICHARDS, B.

I do not altogether concur in that decision of *Davies* v. *Hopkins*, though I feel bound by it; for it seems to me strange to hold that

(*a*) 6 Ir. Jur. 58. (*b*) 17 C. B. 295.

M. T. 1857.
*Exch. Cham.*
BARNETT'S CASE.

the fact of a person being on the claimants' list is to be regarded conclusive as to his right, and that the Assistant-Barrister is precluded any inquiry into the legitimacy of that right.

BALL, J.

I think we are bound by that case of *Davies* v. *Hopkins*, and I see no ground to question its authority.

GREENE, B.

Nothing more is decided, by our present ruling, than that it is no part of the duty of the Barrister to inquire into the validity of service of the notice of claim.

*Per Curiam.*

Affirm the decision of the Assistant-Barrister.

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CORCORAN, *Appellant;* Hon. E. BARNARD, *Respondent.*

*Dec.* 11.

A claimant to register was entered in the list of claimants as the rated occupier of out-house and offices at Gully, at the requisite annual value to qualify for a vote. It appeared that in March 1856, the claimant gave the lands of Gully, for which he was rated, to a person named Thomas, for the purpose of taking a crop of oats, and that he then had no further claim on the lands.—*Held*, that the claimant was not in occupation of the lands twelve months previous to July 1857, as the occupation of Thomas was not merely permissive, and that therefore he was not entitled to be registered.

THIS was an appeal from the decision of the Assistant-Barrister of the West Riding of the county of Cork.

The respondent was returned on the list No. 7, of persons entitled to vote in the election of a Member for the Borough of Bandon Bridge, in respect of hereditaments within the borough. The entry on the list was as follows:—

"Hon. Henry Barnard, Coolmain Castle, rated occupier; out-house and offices at Gully, rated value £12. 10s."

The name of Mr. Barnard being objected to, the Barrister stated these facts:—The Hon. Henry Barnard, in the month of

March 1856, gave the lands of Gully, for which he was rated, and returned in the list for revision, to a person named George Thomas, for the purpose of taking a crop of oats, which he did; and, after taking a crop of oats off the lands, had no further claim on them.

The appellant, therefore, contended that as Mr. Henry B. Barnard was not in occupation of the lands twelve months previous to the 20th of July 1857, his name should have been removed from the list of voters for the borough.

The Barrister held that, as the occupation of George Thomas was only permissive, and for the purpose of taking a crop out of the lands, the Hon. Henry B. Barnard was entitled to be retained on the list, and did accordingly retain him.

*Sullivan* and *Sir C. O'Loghlen*, for the appellant.

Has the owner of property the actual occupation of it, who gives to a tenant the land to take a crop off it; and has he a right to vote, within the 5th section of the 13 & 14 *Vic.*, c. 69? Does he occupy as tenant or owner, and has he been such occupier for the space of twelve calendar months next before the 20th day of July?—[BALL, J. Could Mr. Barnard, during the twelve months, enter on the lands, so cropped by Thomas, without being a trespasser?]—We say he could not, for that the facts stated show that Barnard gave possession as landlord, for the purposes of the soil. The case is within the principle of *Crosby* v. *Wadsworth* (*a*). This was an exclusive right in Thomas to the vesture of the land during the period requisite to crop the oats. But it will be argued that this was but a con-acre letting, and *Dease* v. *O'Reilly* (*b*) may be referred to; but that case was decided on the ground that no tenancy was created between the landlord and the persons putting in the crop: that is a different question from whether they are or are not occupiers of the soil: *In re Mac Mahon* (*c*).—[BALL, J. That is substantially the same principle as laid down in *Crosby* v. *Wadsworth;* but is there any case deciding that con-acre holders

(*a*) 6 East, 602. (*b*) 8 Ir. Law Rep. 52.
(*c*) Ir. Cir. Rep. 443.

M. T. 1857.
*Exch. Cham.*
BARNARD'S CASE.

are not occupiers?]—In *Rogers on Elections*, p. 63, it is said:—"Tenancy, in its most comprehensive sense, describes the right or "title which a man has in lands and tenements, through the several "gradations from tenant in fee-simple to tenant at will; but "occupation describes the exercise of that right by actual user. It "would, therefore, seem to be a confusion of things, in themselves "entirely distinct, to consider that the right of possession as owner, "or the continuance of tenancy under a demise from another, which "amounts to a right to occupy only, necessarily implies the ex-"ercise of that right in fact, or is identically the same thing with "it."

*Charles Andrews* and *Napier*, contra.

It is admitted Mr. Barnard was in actual occupation of the premises for part of the year, but that Thomas was in occupation of the land for a portion of the year. It is not stated in the case that Mr. Barnard received, or that Thomas was to pay, any remuneration for the land; it must be assumed Thomas was but his servant or caretaker. If then, a person having a house and lands give the lands to a person as caretaker, that occupation of the lands is the occupation of the owner. There was no tenancy here, nothing but a permissive occupation.—[BALL, J. There was certainly no tenancy, and it is not admitted or asserted to have been a tenancy.]—Then it was Mr. Barnard's occupation: *Bernard Duigenan's case* (*a*). *Dease* v. *O'Reilly* is strong in our favour.—[BALL, J. That case but decided that the defendant was not a tenant; it did not decide he was not an occupier.]—All we say is, if this was not a tenancy in Thomas, the occupation is still Mr. Barnard's: *Rex* v. *St. Nicholas, Rochester* (*b*). Permissive occupation is the occupation of him who gives the permission; and even if that were not the case, the occupation of Thomas, as stated, is not an occupation of the land, but only of a usufruct of the lands. In that case of *Rex* v. *St. Nicholas*, Lord Denman says, "The meaning of "the word 'occupied' may vary according to the occasion or the "subject-matter. The meaning, therefore, which it has received

(*a*) Alc. Reg. Cas. 114. (*b*) 5 B. & Ad. 226.

"in considering what occupation was necessary to constitute a "mansion-house, in which burglary may be committed, or to give "a right of voting, or to make a party rateable to the relief of the "poor, is no test of its meaning in this particular case." That was a question of settlement. Here Thomas had but a limited permissive user restricted to one purpose, a temporary easement given to Thomas, but no parting with the land by Mr. Barnard: *Pitts* v. *Smedley* (*a*); *Close* v. *Brady* (*b*). The letting of land in con-acre is but a mode of farming it: *Parker* v. *Staniland* (*c*). There Lord Ellenborough says, in a similar case, "The defendant had no right to "the possession of the close; he had only an easement, a right to "come upon the land for the purpose of taking up and carrying "away the potatoes, but that gave him no interest in the soil."

*Sir C. O'Loghlen* replied.

The Act requires a claimant to occupy, as tenant or owner, the premises out of which he seeks to register, for twelve months previous to 20th of July in each year; and so the question here is, did Mr. Barnard occupy the premises out of which he sought to register, for twelve months previous to 20th of July last? Occupation is actual or virtual. A man actually occupies when he occupies by himself or his family; he virtually occupies when he occupies by servants, caretakers or lodgers. It is not contended here that Mr. Barnard's occupation was an actual one; is it then a virtual one? The Barrister does not find that; for the case, if taken literally, shows the vote ought to be rejected, as it finds not that the occupation of Thomas was Barnard's occupation, but that it was permissive occupation of Thomas. Whether or not permissive occupation be the occupation of the party giving the permission depends on circumstances; as, for example, when the permissive occupant derives no profit from the land, then the person giving the permission is the occupier; but when he does derive a profit, when he has any temporary interest, then the permissive occupant is the occupier. A steward or caretaker,

(*a*) 7 M. & G. 85. (*b*) 1 J. & C. 186.

(*c*) 11 East, 362.

M. T. 1857.
*Exch. Cham.*
BARNARD'S CASE.

deriving no profit from the land, is not the occupier; but if a party be put in, and he is given the benefit of the land, he is the occupier: *Lord Bute* v. *Grindall* (*a*). The question in that case was, under the old English Poor-law Act, declaring every occupier of lands, &c., liable to be rated to the relief of the poor, whether Lord Bute was an occupier of Richmond Park? and it was held he was, because he had a beneficial interest in the park: *The Queen* v. *Ponsonby* (*b*). Thomas had here a beneficial interest in his occupation, and is therefore the occupier, unless what he occupied was not the land, but only the usufruct in the land. It is immaterial whether the land is to be used for one purpose or for several; it is still an occupation: *Greenslade* v. *Tapscott* (*c*). There, a lease contained a stipulation that, for every acre, and so in proportion for a less quantity, of the land which the lessee should suffer to be occupied by any other person, without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress and manure the land, according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land, for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course; and it was held that the landlord was entitled to the additional rent, this being an occupation of the land by other persons: *The King* v. *Watson* (*d*).

PENNEFATHER, B.

The question in the present case is, did the Hon. Mr. Barnard occupy the lands, of which he is described as rated occupier, for twelve months prior to the 20th of July 1857? The facts are not so precisely stated as we could desire; and we necessarily must draw some conclusions both of fact and law. It is stated that, in the month of March 1856, Mr. Barnard gave to Thomas a portion of the lands of Gully, for the purpose of taking a crop of oats; it is conceded that Thomas was to sow the lands, and

(*a*) 1 T. R. 338.
(*b*) 3 Q. B. 14.
(*c*) 1 Cr., M. & R. 55.
(*d*) 5 East, 480.

that the occupation then given him was for the purpose of taking a crop of oats off the lands. The crop was sown in the Spring of 1856, and did not necessarily ripen until after the 20th of July of that year. Then, during that time whose was the occupation? It was that of Thomas; it continued with him from the sowing of the land until the crop was taken off the land. It was not an occupation for the use of Mr. Barnard; he certainly had not the actual occupation; nor can it be held that he had a virtual occupation by reason of Thomas' occupation. These are the conclusions we draw from the Assistant-Barrister's statement, which we were anxious to remit, for a fuller and more explicit detail of the facts; but the Counsel on both sides thought it unnecessary. On these facts, then, the Barrister admitted Mr. Barnard to register, on the ground that Thomas' occupation was permissive; but that unquestionably cannot be a correct inference. If it were an occupation by demise from year to year, it would be permissive, an occupation of the party so holding, and for his benefit; but that cannot be the accurate criterion to decide this question. Was it a permissive occupation for Thomas, or for the benefit of Mr. Barnard? If it were the occupation of a servant or caretaker, the case would be different; the occupation then would be for the benefit of the master or owner. The words of the statute are, "who shall occupy as tenant or owner;" occupation generally, that means for the benefit of the person in possession, of the person seeking to register his vote. These premises were situate in a town, and a large portion of them consisted of out-house and offices, and, it is said, that a small portion consisted of land; but the rating is, "out-house and offices at Gully," and therefore the lands are as much portion of the premises as the out-house and offices. The person seeking to register must be in possession of the entire premises, and the occupation must be for the use of the person seeking to register. One case cited bears materially on the question, the case of *Greenslade* v. *Tapscott* (*a*). The reason of the Assistant-Barrister does not warrant his conclusion, and therefore Mr. Barnard's name must be struck off the list.

(*a*) 1 Cr., M. & R. 55.

M. T. 1857.
*Exch. Cham.*

FAGAN, *Appellant;* KEATING, *Respondent.*

*Dec.* 12.

A claimant to register proved that he had occupied as tenant the premises in respect of which his name appeared on the list of persons entitled to vote as rated occupiers, from the 1st of April 1856, up to the time of claiming. On the 1st of April 1856, the Collector-General of rates had applotted on the premises the rates payable for 1856, and made them payable by instalments, in advance, on the 1st of January, 1st of April, 1st of July and 1st of October. The former occupier of the premises was rated in respect thereof on the books of the Collector-General for the rate made and applotted for 1856, on the 1st of January 1856; and in October 1856, the Collector-General substituted the name of the claimant in the rate-book for that of the former occupier. The claimant, before the 1st of July 1857, paid the third and fourth instalments for 1856, made payable on the 1st of July and 1st of October, but he did not pay the second instalment for 1856, made payable on the 1st of April 1856, which was yet unpaid. There did not appear on the books of the Collector-General any arrear of rate in respect of the premises.—*Held*, that the claimant had not, within the meaning of 13 & 14 *Vic.*, c. 69, s. 5, previously to the 1st of July last, paid all rates payable in respect of the premises previously to the 1st of January in that year, and that he was not entitled to be registered.

THIS was an appeal from the Revision Court of the city of Dublin. The name of John Fagan appeared on list No. 7, of persons entitled to vote as rated occupiers of premises in said city.

The respondent, whose name appeared on list No. 9, duly objected to the said name being retained on list No. 7. On proof of the service of the objection, the Revising Barrister required it to be proved that the appellant was entitled, on the 20th of July, to have his name inserted on the list.

On the part of the appellant, it was proved that he had occupied, as tenant, the premises in respect of which his name appeared on the said list, from the 1st of April 1856, up to the present time.

On the part of the objector it was then proved that, upon the 1st of January 1856, the Collector-General of rates had applotted upon the said premises the poor-rate and other rates payable in respect of the said premises for the year 1856, and had made the same payable by four quarterly instalments, payable respectively in advance, on the 1st of January, the 1st of April, the 1st of July and the 1st of October.

That the former occupier of the premises was rated in respect thereof, on the books of the Collector-General, for the rate made and applotted for the year 1856, on the said 1st of January 1856. That in the month of October 1856, the said Collector-General substituted the name of the said John Fagan in the rate-book for that of the former occupier. That the said appellant, before the 1st of July

1857, paid the third and fourth quarterly instalments for the year 1856, made payable, as aforesaid, on the 1st of July and 1st of October respectively. That he did not pay the second quarterly instalment for the year 1856, made payable, as aforesaid, on the 1st day of April, and that the same is yet unpaid.

On the part of the appellant, it was then proved that, on the books of the Collector-General for the present year, there is no entry of any arrear of rates in respect of the said premises; that no such arrear has been carried forward as against the said premises, or against the occupier thereof, in the said books; and that it is the practice of the Collector-General, when the rates for any year, or any portion of any year, are in arrear, to carry them forward in the books of the following year; and that, unless they are so carried forward, the sub-collectors of rates for the district are no longer authorised to demand payment of such arrears.

Upon this state of facts, the Revising Barrister decided that John Fagan had not, within the meaning of the 5th section of 13 & 14 *Vic.*, c. 69, previously to the 1st day of July last, paid all poor-rates payable from him in respect of the said premises previously to the 1st of January in this year, and that he was not entitled to be registered, and therefore the Barrister expunged his name from the list of voters.

If the Revising Barrister were wrong in so doing, the name of John Fagan was to be inserted in the register of voters.

*C. Barry* (with him *Sir Colman O'Loghlen* and *T. O'Hagan*), for the appellant.

Were these instalments rates payable from the appellant, within the meaning of the statute, which, by its 5th section (13 & 14 *Vic.*, c. 69), provides that every occupier of premises rated at £8 or upwards, being such occupier for twelve months next before the 20th day of July, and who shall on or before the 1st day of July have paid all poor-rates in respect of such respective premises, which shall have become payable from him in respect of such premises previously to the 1st day of January shall be registered? Now this particular rate was payable by the appellant, for each

M. T. 1857.
*Exch. Cham.*
FAGAN'S CASE.

instalment is a separate rate.—[RICHARDS, B. But the appellant may be charged with the instalment.]—He may, but still it is not a rate payable from him. The 1 & 2 *Vic.*, c. 56, s. 71 (Poor-law Act), declares, "That every rate made under the authority of this "Act shall be paid to the person authorised to collect the same, "by the person in the actual occupation of the rateable property "at the time of the rate made; and on his default, then by the "person subsequently in the occupation of the rateable property, "from whom such rate shall be demanded." That is, the person is only liable after demand on the previous occupier's default, and it should have been shown here that such demand was made; in point of fact none such was made, and the Collector-General of rates struck the demand out of his books.

Independently of that, the rates payable are those only which accrued due during the occupation; there are the three requisites for registry—occupation, rating and payment of the rate—and no one is liable unless the rate be demanded. The 2 & 3 *W.* 4, c. 45, s. 27 *(Eng.)*, is the analogous section to the 5th section of 13 & 14 *Vic.*, c. 69, and it aids this view.

*Brereton* and *Hyndman*, contra.

This question does not turn on the Poor-law Act, but on 12 and 13 *Vic.*, c. 91, the Collection of Rates Act. The 48th section of that Act enacts, "That such Collector-General, upon receiving "such yearly estimates as aforesaid, shall, as soon as may be "after the receipt of the same, according to the several amounts "in such estimates contained, make and declare the poundage "rate to be levied in respect of each such estimate upon all "premises, &c.; and such estimate, so apportioned, and such rate "or rates for each such year as aforesaid, shall be due and payable "in manner hereinafter mentioned." The 52nd section provides that the Collector-General, after receiving the estimate, shall give notice in the *Dublin Gazette*, and in two public newspapers published in the city of Dublin, stating the amount of the estimate and the poundage; and "in case the said Collector-General shall "determine that the said rates shall be paid by instalments, stating "the days upon which the instalments of such rate will become

"payable; and from and after such publication as aforesaid, the "said rates shall be, and be deemed to be, due and payable." Again, the 62nd section directs that unoccupied premises shall be included in the rates, and if the premises are afterwards occupied, a portion of the rates to be paid, proportioned to the time during which such person occupies such property. Then, by the 67th section:—"If any person shall think himself aggrieved by any rate, on "the ground of inequality, unfairness or incorrectness in the valua-"tion of any rateable property included therein, or in the amount "assessed thereon, he may, at any time, within one month after "such rate is applotted by the Collector-General, appeal to a "Divisional Justice of the district within which the rateable "property is situated," &c. And the 74th section enacts, "That "when any rate has been made for a particular period, and "the owner or occupier who is rated to such rate ceases to "be the owner or occupier of the property in respect whereof "he is rated, before the end of such period, such owner or "occupier shall be liable to pay a portion only of the rate pay-"able for the whole of such period, proportionate to the time "during which he continued to be owner or occupier; and in "every such case, if any person, after the making of such rate, "become the owner or occupier of any property so rated as afore-"said, during part of the period for which such rate was made, "such person shall pay a portion of such rate, proportioned to the "time during which he held or occupied the property so rated, "and the same shall be recovered from him in the same manner "as if he had been originally rated for such property." The 61st section creates a difficulty; for, after empowering the Collector-General from time to time to amend the rate, by inserting the name of any one claiming to have his name therein as owner or occupier, or by inserting a name which ought to have been rated, or by striking out the name, it enacts that no such amendment shall be held to avoid the rate:—"Provided always, that every person "aggrieved by any such alteration shall have the same right of appeal "therefrom as he would have had if his name had been originally "inserted in such rate, and no such alteration had been made; "and as respects such person, the rate shall be considered to have

M. T. 1857.
*Exch. Cham.*
FAGAN'S CASE.

"been made at the time when he received notice of such altera-"tion; and every person whose rates are altered shall be entitled to "seven days' notice of such alteration, before the rate shall be pay-"able by him." If, therefore, the appellant came into possession on any day in April, he was liable for every portion of the rate. Each successive occupier is liable for a proportion of the rate during the time he occupies; the poorer occupiers are allowed to pay by instalments, but the rich are to pay the whole.—[GREENE, B. The 74th section makes occupiers liable for a portion of the rate only; but the 61st section authorises the Collector to amend the rate, enabling the rated person to appeal against the amendment, as though he was originally on it, and "such person" means appellant within a month from time of notice given.]—As to compulsory payment of the rate: *Ford* v. *Smedley* (*a*). There, where a house tax was payable on the 20th of December 1851, but not demanded until the 11th of April 1852, and the party assessed did not pay it until after the 20th of July—*Held*, that he had not paid on or before the 20th of July all assessed taxes which became payable from him in respect of the premises previously to the 5th of January, and that he was not entitled to be registered. This rate was plainly payable without demand.

*Sir C. O'Loghlen* was called on.

The 74th section declares the subsequent occupier liable; but is the rate payable from him before the Collector-General demands the rate; is it a rate payable from him until demand made? *In re Brennan* (*b*).

BALL, J.

Do you mean that the statute left it optional with a claimant whether or not he paid the rate?—for, according to the argument, a man may have the franchise without paying rates, because no notice calling on him to pay rates was served.

PENNEFATHER, B.

We must affirm the decision of the Barrister.

(*a*) 12 C. B. 622. (*b*) 3 Ir. Com. Law Rep. 162.

M. T. 1857.
*Exch. Cham.*

ROBT. KEYS, *Appellant;* ARCHBD. COLLUM, *Respondent.*

*Dec.* 12.

Certain evidence was received at the Registry Sessions, to prove that the premises out of which the claimant sought to register were outside the limits of the borough.—*Held*, that this was a question of fact, and no appeal lay from the decision of the Barrister as to the admissibility of the evidence.

THIS was an appeal from the decision of the Assistant-Barrister of the county of Fermanagh.

The case stated that the appellant's name appeared on the list No. 7, of persons entited to vote at the election of Members for the Borough of Enniskillen.

The premises, out of which he claims as a rated occupier, are described in said list No. 7 as follows:—"Fort Lodge Buildings, in Tonystick, in the borough of Enniskillen;" and the rated value thereof in said list is £25.

The objection raised in this case is, that the premises in question are outside the limits of the borough of Enniskillen, as set forth in 2 & 3 *W.* 4, c. 89. In support of the objection, a tracing of the Ordnance map, on which that part of the borough is, was produced; and if said tracing has been properly received in evidence, it was clearly shown that by it the premises were not within the limits aforesaid. I was of opinion that the tracing was sufficiently established in evidence, and expunged the name of the said Robert Keys from the said list No. 7; and the appellant insisted that the writing, purporting to be a certificate on said tracing, was not a certificate within the meaning of the 14 & 15 *Vic.*, c. 99. The words authenticating the tracing were as follows:—"Ordnance "Survey.—Traced from revised sheet 22, of the county of Fer-"managh, showing the position of the boundary of the parliamentary "borough. "G. A. Leech, Captain, R. E.

"19th October 1857."

The name of Captain Leech was signed to same, and it was proved that the original Ordnance map was in his custody at Dublin; that he was the person appointed to take charge of the original Ordnance maps in Dublin; that an application had been made to Government for the original map, and refused, and that thereupon the tracing now in question was given. No evidence, save the

M. T. 1857.
*Exch. Cham.*
COLLUM'S CASE.

production of the registry and list No. 7, was given by the appellant.

The question for the Court is, whether or not the tracing was properly received by me in evidence? Should the Court be of opinion that I was right in receiving it in evidence, the name of the appellant is to be expunged from the list No. 7; should I have been wrong in receiving the said tracing in evidence, the said name is to be inserted in said list No. 7.

*Acheson Henderson* and *Napier*, for the appellant.

*Lawson* and *Kernan*, for the respondent, objected to the appeal being heard, as it was a question of fact was referred to the Court, and the 78th section of 13 & 14 *Vic.*, c. 69, precludes any such inquiry:—"No appeal or notice of appeal under this Act shall be "received or allowed against any decision of any Assistant-Barrister "upon any question of fact only, or upon the admissibility or effect "of any evidence adduced or made in any case to establish any "matter of fact only," &c. The question referred is really, was this house outside the borough of Enniskillen? an appeal as to the admissibility of the evidence.

*Henderson* and *Napier*.

The Barrister acts both as Judge and jury, and the question submitted here is not matter of fact only. The test is, had the matter occurred at Nisi Prius, could it have been determined by the jury without a direction as to the tracing or the map? The 2 & 3 *W.* 4, c. 88, defines the limits of boroughs, involving the construction of several sections of the Act, and of the schedule; and by section 2 of that Act, a construction is given to certain words therein used; this is a case, therefore, both of law and fact, a case where the fact results from the law, and the Court are by the appeal called on to put a construction on the Act of Parliament: *Bayley* v. *Overseers of Nantwich* (*a*). Tindal, C. J., there says:—"The sole point referred to us was, whether the duplicate notice of

(*a*) 2 C. B. 118.

"claim, properly stamped, was sufficient evidence of the claim being "in time. This point was decided in the case of a notice of "objection, and we think there is no distinction to be taken in this "respect between a notice of objection and a notice of claim." *Palmer, appellant; Allen, respondent* (*a*). This evidence could only be received as to the construction of the Boundary Act; it is not admissible on matter of fact.

BALL, J.

The question referred is, was the tracing properly received in evidence? and no such question can be submitted to us, having regard to the 78th section of 13 & 14 *Vic.*

PENNEFATHER, B.

It is a question of fact whether the *locus in quo* be or not outside the boundary of the borough.

GREENE, B.

No question is reserved as to the construction of the Act of Parliament; and in the case of *Bayley* v. *Overseers of Nantwich*, an amended case was sent to the Revising Barrister, who returned it with this observation:—"The only question intended to be sub-"mitted to the Court was, whether, taking the sections 100 and 101 "of the 6 & 7 *Vic.*, c. 78, together, the production of the stamped "duplicate of notice of claim, duly delivered to the post-master, and "duly directed to the Overseers of Nantwich, was to be held con-"clusive evidence of the notice of claim having been given to the "Overseers at the place mentioned in such duplicate, on the day on "which such notice would, in the ordinary course of post, have "been delivered at such place;" so that case went on two sections of that particular Act of Parliament.

RICHARDS, B.

The evidence received by the Barrister was to establish a fact; how can there be an appeal on that evidence?

BALL, J.

The question in *Bayley* v. *Overseers of Nantwich* arose on the sufficiency of the evidence, not on its admissibility; here it is on

(*a*) 6 C. B. 51.

M. T. 1857.
*Exch. Cham.*
COLLUM'S CASE.

the admissibility, not on the sufficiency. The 13 & 14 *Vic.* directs the Barrister to state the facts established by the evidence, and his decision on the case, and his decision upon the point of law appealed from; here he has stated as the point appealed against, whether or not a certain document was evidence. We cannot entertain the appeal.

PENNEFATHER, B.

It is a mere question of fact, and constitutes no ground of appeal.

*Per Curiam.*

Dismiss the appeal.

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OWEN CUMMINS, *Appellant;* T. E. TUTHILL, *Respondent.*

*Dec.* 12.

A claimant's name appeared on the list of persons entitled to vote in respect of every right, other than as rated occupier; and, being objected to, the Barrister required proof that the claimant was entitled, on the 20th of July, 1857, to have his name inserted on said list; and for this purpose the register of voters of 1857 was produced, where claimant's name and same qualification appeared. The objector then proved that the claimant had, previous to the 20th of July, changed his place of abode, but gave no evidence that the estate or interest of the claimant in the property in respect of which his name appeared on the list had been changed.—*Held*, that the place of abode of the voter formed no part of his qualification, and that the 13 & 14 *Vic.*, c. 69, s. 55, did not create any new grounds of objection to a voter, and applied only to cases in which the place of abode of the voter would be evidence from which a change in his estate or interest in the property might be inferred, and that therefore the Barrister was at liberty to amend the list, by inserting the true place of abode of the claimant.

THIS was an appeal from the Revision Court of the city of Dublin. The name of Thomas E. Tuthill appeared on list No. 8, of persons (not being on freeman's roll) entitled to vote in respect of every right other than as rated occupier. The following is a copy of the entry on the list:—

| Name. | Place of Abode. | Nature of Qualification. | Place where Property situate. |
|---|---|---|---|
| Thomas E. Tuthill, Esquire. | Leeson-street, | Freehold, £50. | House and Premises, 52 Stephen's-green East. |

Owen Cummins, whose name appeared on list No. 7, of persons entitled to vote in the election of Members for the said city, duly objected to the name of the said Thomas E. Tuthill being retained on the said list No. 8, and proved the service of the objection.

The Revising Barrister then required it to be proved that Thomas E. Tuthill was entitled, on the 20th day of July 1857, to have his name inserted on said list. For this purpose the register of voters for 1857 was produced on behalf of the respondent, and in it appeared the name of Thomas E. Tuthill as a registered voter, in respect of the same qualification in respect of which his name appears on the list; his *prima facie* right to have his name inserted on the said list was thereby established. The objector then proved that Thomas E. Tuthill had, previous to the 20th of July in the present year, changed his place of abode from Leeson-street to Fitzwilliam-square, but gave no evidence that the estate or interest of the said Thomas E. Tuthill in the said property, in respect of which his name appeared on the said list, had been in any way changed, parted with, or deteriorated in value; and he required the Revising Barrister, in pursuance of the provisions of the 55th section of 13 & 14 *Vic.*, c. 69, to call upon Thomas E. Tuthill, or some one on his behalf, to prove, by direct evidence, as to the fact that he possessed, on the 20th of July, the same qualification in respect of which his name appeared on the said list, or otherwise to erase his name from the said list.

The Barrister, being of opinion, on the authority of *Luckett* v. *Knowles* (*a*), that the place of abode of the voter formed no part of the qualification, that it was not intended by the 55th section to create any new grounds of objection to a voter, and that the provisions of the section were intended to apply only to cases in which the place of abode of the voter could be evidence from which a change in his estate or interest in the property might be inferred, decided, that he was at liberty to amend the list, by inserting therein the true place of abode of the respondent, and that it was unnecessary for him to offer any evidence other than that afforded by the register of 1857, that he possessed, on the

(*a*) 2 C. B. 187.

M. T. 1857.
*Exch. Cham.*
TUTHILL'S CASE.

20th of July, the same qualification in respect of which his name was inserted in said list, and declined to erase his name from the list. The Barrister accordingly amended the list, by inserting the true place of abode of the respondent, and retained his name on the list.

*C. Barry* and *Sir C. O'Loghlen* (with them *T. O'Hagan*), for the appellant.

This case rests on the proviso of the 55th section of 13 & 14 *Vic.*, c. 69, "That the appearance of the name of any elector (other than "those entitled to register for any county, city, town or borough, in "respect of occupation as rated occupiers of lands, tenements or he-"reditaments, of the value respectively of £12 or upwards, or of £8 "or upwards), on the list of registered voters, or the copy of the "register in each year, shall be deemed to be *prima facie* evidence "of his right to have his name inserted in the register for the year "then next ensuing; provided also, that where any person whose "name appears on any list of voters for any county, city, town or "borough, shall be objected to, on the ground of having changed "his place of abode, without having sent in a fresh notice of claim, "it shall be lawful for the Assistant-Barrister, on revising the list, "to retain the name of such person on the list of voters, if such "person, or some one on his behalf, shall prove that he possessed, "on the 20th day of July, the same qualification in respect of "which his name has been inserted in such list, and shall also "supply his true place of abode, which such Assistant-Barrister "shall insert in such list."

The production of the register is *prima facie* evidence, except where the claimant has changed his residence, and he is then put on proof of his claim; here, no proof was given—no evidence that he possessed the qualification, and therefore the name should be expunged.

*Brereton* and *Hyndman*, contra.

Residence is no part of the qualification to be registered; and an objection on account of the claimant having changed his abode

M. T. 1857.
[*Exch. Cham.*
TUTHILL'S CASE.

cannot have force when change of residence is no ground of disqualification. The proviso says, if he prove that he possessed the same qualification, not that he occupied the same residence.—[RICHARDS, B. Not a new qualification, but the same qualification; but whether seeking to register out of his residence or not, he must supply his true place of abode whence the notice to register comes. Would it not be open to the Barrister to receive, as matter of evidence, the register of the previous year?]—The Barrister can amend a mere misdescription of residence, without any notice at all; and here the claimant was on the list.—[RICHARDS, B. Then is not this an appeal on a question of evidence? The Barrister received the evidence and was satisfied.—PENNEFATHER, B. We have no authority to say the Barrister was wrong in receiving this evidence; the Court are precluded doing so, by the 78th section of 13 & 14 *Vic.*, c. 69.]

*Per Curiam.*

Affirm the decision.

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CORCORAN, *Appellant*; M'CABE, *Respondent*.

*Dec.* 12.

Claimant occupied and resided in premises in the borough of B., and a person named H. occupied one room of the house for an office for the collection of poor-rates; the front door was common to the claimant and H.—*Held*, that the claimant was entitled to be registered, though H. had exclusive occupation of a portion of the premises.

THE respondent was returned on list No. 7, of persons entitled to vote in the election of a Member for the Borough of Bandon Bridge, in respect of hereditaments within said borough; the entry on said list being as follows:—

"Isaac M'Cabe, Shannon-street, rated occupier; description of "premises, rated house and yard in Shannon-street; rated value, "£8."

The name of Isaac M'Cabe was duly objected to, and the facts of the case were as follow:—The said Isaac M'Cabe occupied

M. T. 1857.
*Exch. Cham.*
M'CABE'S CASE.

and resided in the premises in question, and a person named Halliburton occupied one room of said house, for the purpose of an office to collect poor-rates, for which he paid £1. 10s. 0d. a-year. There was only one door in the front of the house, opening into the street, and which was common to the said Isaac M'Cabe and the said William Halliburton. The appellant objected that, as the said William Halliburton had exclusive occupation of a portion of the rated premises, as tenant to the said Isaac M'Cabe, that he, M'Cabe, did not occupy the entire of the rated premises, within the 13 & 14 *Vic.*, c. 69, s. 5.

The Barrister held that he was the owner of the house, and liable to the rent, rates and taxes, and retained his name on the list.

Counsel for the appellant declined to argue the case, and the decision of the Barrister was affirmed.

M. T. 1857.
*Exchequer.*

## COPLEY *v.* ENRIGHT.

*(Exchequer.)*

*Nov.* 18.

A demise of lands, simply (without exceptions), operates to pass the crops then growing thereon. Where a former tenant of the lands was entitled to the growing crops as emblements, and the landlord, after making such a demise, purchased that former tenant's rights—*Held*, that he could not derogate from his own grant, and was estopped by the demise from saying that the crops did not belong to the new lessee.

THE summons and plaint in this case alleged that, in and previously to the year 1855, one Gerald Griffin was lawfully possessed of the lands of Ballyclough, under the Court of Chancery, for an unexpired term of seven years, provided a certain cause then pending in said Court should so long continue; and that, being so possessed, in November 1855, whilst the said cause was still pending, said G. Griffin, as such tenant, sowed wheat on eight acres of said lands; and that afterwards, by an order in said cause, dated the 16th of January 1856, it was ordered that all proceedings in said cause should be stayed, and decrees satisfied, whereby said suit was determined, and the tenancy of said G. Griffin was also determined on said day, whilst said crop of wheat was still growing; and said G. Griffin became entitled to the said crop, as emblements: and that it was ordered, by a further order of the said Court, dated the 20th of February 1856, that an injunction should issue, to put the plaintiff in possession of the said lands; and it was thereby ordered that said order should be without prejudice to the claim of said G. Griffin for emblements; that the said G. Griffin, on the 15th of April 1856, in consideration of £86, duly bargained, sold and transferred the said crop of wheat, and all his interest therein, to the plaintiff; and that the defendant, on the 22nd of August, carried away the said crop, and converted same to his own use. The summons and plaint also contained a general count for cutting and carrying away wheat the property of the plaintiff.

To each count a similar defence was put in, viz., that by indenture, dated the 7th of April 1856, between the plaintiff, of the one part, and defendant, of the other part, the plaintiff demised the lands whereon the said wheat was so growing, to defendant, for twenty-

M. T. 1857.
*Exchequer.*
COPLEY
*v.*
ENRIGHT.

one years from the 25th of March 1856, at the yearly rent of £272. 15s. 7d., payable by two half-yearly payments, the first payment to be made on the 29th of September 1856, and which payment was made on the 21st of October, under which indenture defendant entered and enjoyed said lands; and that said indenture contained no exception or reservation of the said growing wheat, and that he afterwards did cut and carry away the said wheat, as he lawfully might.

To the defence on the first count, the plaintiff demurred; and to that on the second he put in a replication, similar in terms to the first count of the summons and plaint, in which, however, he averred that the defendant had notice of G. Griffin being entitled to the crop. The defendant demurred to this replication; and the point involved in each demurrer was the same, viz., that the plaintiff could not derogate from his own grant, and was precluded from setting up or relying on the matters in the replication, and from setting up a title or claim inconsistent with said indenture of lease.

The case came before the Court first upon the demurrer to the defence, and was heard by PENNEFATHER, B., alone; and the demurrer to the replication was afterwards argued before PENNEFATHER, RICHARDS and GREENE, BB.

*Sullivan*, in support of the demurrer.

The landlord, by his demise of the lands, conveyed to the defendant the crops and everything else growing on the lands. They were portion of the soil and freehold: *Cooper* v. *Woolfett* (*a*); and he cannot now derogate from his own grant.—[GREENE, B. Would not he have to re-enter on the lands if he were entitled to these crops? and had he any right to say, after his demise, that a third person had a right of entry?]—In *Wiggleworth* v. *Dallison*, and the cases cited in the notes to that case, 1 *Smith's Leading Cases*, p. 453, the right to the way-going crop was not inconsistent with the terms of the lease or holding; but here it would be perfectly inconsistent with the demise to say that a third person was entitled to the crops.

(*a*) 2 Ex. R., N. S., 122.

*Ferguson* and *J. Clarke*, contra.

The words of the deed would operate to convey the crop, if the lessor had it; but it was then vested in another person.—[PENNEFATHER, B. Does not an indenture demising land *prima facie* purport to convey the crop?]—The effect of the indenture is only to convey what the party has.—[PENNEFATHER, B. If, under the same circumstances, the lease conveyed the crop in express terms, would the lessor be allowed to say it did not?]—Where the words are merely sufficient to convey, but do not do so in express terms, there is no estoppel: *Doe* d. *Freeland* v. *Burt* (*a*).—[GREENE, B. In that case, the premises which were intended to be demised were particularly described as "late in the occupation of A." If there were anything ambiguous in the present demise, that would be an authority for the plaintiff; but the words in this demise clearly and *prima facie* pass the crops.]—Every estoppel ought to be a precise affirmation of that which maketh the estoppel. The landlord could not have excepted this crop, because he himself was not entitled to it; and the after-acquired interest did not pass: *Shep. Touch.*, p. 90. There was no estoppel here, as the interest passed by the demise: *Com. Dig.*, *Estoppel*, E, 8. The possession of the crop was not in the landlord at the time of the demise: *Griffiths* v. *Puleston* (*b*).

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The following was the judgment delivered upon the first argument:—

PENNEFATHER, B.

This case involves a point of great nicety, and the following are the facts appearing in it.—[His Lordship here adverted to the facts of the case.]—I think that it may be admitted that Griffin, if he had not parted with his interest, or if he had parted with his interest to a stranger, the latter, as assignee, could have maintained trover for and have recovered this crop of wheat, to which he Griffin was entitled as emblements. Here, however, he has parted with his interest, not to a stranger, but to the landlord, who asserts that he ought not to be placed in a worse position than Griffin, from

(*a*) 1 T. R. 701. (*b*) 13 M. & W. 358.

M. T. 1857.
*Exchequer.*
COPLEY
*v.*
ENRIGHT.

whom he purchased. Let us see whether that is the conclusion which should follow in this case. The landlord had by the lease *prima facie* conveyed with the land everything thereon to the defendant; and if, notwithstanding that, Griffin or any other person would have been entitled to come upon the land and remove the crops, which were so *prima facie* conveyed with the land, then, under the terms of the covenant for quiet enjoyment contained in the lease, the defendant could have maintained an action against the landlord for such a trespass. The plaintiff, however, settled the matter, and saved his liability by purchasing the standing crop from Griffin. Instead of having to make reparation to the defendant, or to defend an action for the breach of his covenant, he purchased up Griffin's interest in the crops; and having done so, he is now, in my opinion, estopped from saying that those crops did not pass with the land by his demise.

I think, therefore, that this demurrer must be overruled, and that the defence puts forward a good answer to the action.

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The following was the judgment delivered on the second argument:—

PENNEFATHER, B.

When this case came before me on a former occasion, I thought the landlord could not take this crop, in derogation of his own grant. It was almost admitted by Mr. *Ferguson*, in the course of his argument, that if there had been an express grant of the crops, the case he contends for could not be made. When land is granted, it appears to me that there is an express grant of the growing crops; I mean that it purports to grant the growing crops expressly, and that there was therefore a conveyance of this crop growing on the lands, by reason of that express grant. It has been said that the decision against the landlord was very much against justice, but I really do not see that the facts of this case involve that. The landlord, who makes a grant of this land, must be intended to make a grant of the land with everything growing on it. He cannot be said to claim this crop, against the words of his own grant. What injustice is there in saying he shall not be allowed to derogate from his own grant, and claim this crop, as he seeks to do here? The demise was made with-

out any exception as to the rights of the former tenant, which it should have contained if it had been intended that those rights should be excepted. Is it not then for the interest of the landlord to purchase up these rights, in respect of which, if a third person had reserved them, the landlord would have been subject to an action at the suit of his tenant? Therefore our decision does not seem to militate against the justice of the case. This does not seem to me to differ substantially from the former demurrer, because of notice being averred in the replication.

RICHARDS, B., concurred.

GREENE, B.

The simple question is, whether the present claim is in derogation of the landlord's grant? It is impossible to say that it is *not*.

Demurrer to the replication allowed.

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## EARLY *v.* SMYTH.

*Nov.* 20.

In an action against an auctioneer, for money had received, to the use of the plaintiff, the defendant pleaded (as to £11. 18s., part of the sum claimed), that, being an auctioneer, he was employed to sell a farm, for which the plaintiff bid the highest price, and was accordingly declared the purchaser; and that said sum of £11. 18s. was lodged with him by the plaintiff as a deposit, pursuant to the conditions of sale, and that this was the amount which he was entitled to retain, and had retained, as auctioneer's fees.—*Held*, that this plea was embarrassing, and should be set aside.

An embarrassing plea will be set aside on motion, even though it appear to be demurrable.

Where an action is brought for money had and received, to plaintiff's use, against an auctioneer, to recover the amount of a deposit paid to him, he must (in the absence of an express condition of sale) set out such facts as would be sufficient to justify him in paying the entire purchase-money (if still in his hands) to the vendor.

THIS was an application to take the second defence off the file, as being calculated to prejudice, embarrass and delay the fair trial of the action, and because it amounted to the general issue, and because it did not show any grounds on which the defendant was entitled to retain £11. 18s. of the plaintiff's money, or for liberty to mark judgment as if no defence had been filed. The summons and plaint were for £20, moneys had and received by the defendant, to the plaintiff's use; and the bill of particulars was in these words:—"To amount of deposit placed this day in the hands of "the defendant, on account of the purchase of the interest as lessee "of one James Daly, in the lands of Derragh, and to which lease-

M. T. 1857.
*Exchequer.*
EARLY
*v.*
SMYTH.

"hold or premises the said James Daly has failed to make a title, "£20." Plea: as to £8. 2s. lodged in Court, and as to £11. 18s., residue of sum demanded, the defendant says, "That being a licensed "auctioneer, he was, on or about, &c., employed by one James Daly "to sell an interest in a certain farm, and that the said plaintiff, "having bid the highest amount for same, was declared the purchaser "thereof by defendant; and thereupon that the plaintiff did, pursuant "to the conditions of sale, deposit the sum of £11. 18s. with the "defendant, and that the said sum of £11. 18s. was the amount "which he, the said defendant, was entitled to as and for auction "fees, as such auctioneer as aforesaid; and defendant saith that "he performed all the conditions on his part to be performed as "such auctioneer as aforesaid, and was ready and willing to perform "all other matters to which he might be required in relation thereto; "and that he, the said defendant, was entitled to retain the amount "of the said deposit of £11. 18s., for and on account of his said "auction fees; and that he, the said defendant, hath retained the "said sum of £11. 18s. for said fees."

*Vereker* (with *Close*).

The plea states that the defendant was employed by one James Daly to sell a farm, but it does not state how he was to sell it; nor does it state that he ever sold it at all. It then states that the plaintiff, having bid the highest amount for same, was declared the purchaser, but it does not state under what circumstances, or when or where he was declared the purchaser; nor does it state, as it ought to have done, to make it intelligible, that he ever, in fact, became the purchaser. It then admits the money to have been lodged with the defendant, as a deposit, which is tantamount to a confession that the money was the plaintiff's, and thus it throws the onus on the defendant of showing his legal right to retain the plaintiff's money. It does not do this. But it states that £11. 18s. was the amount the defendant was entitled to as his fees, without stating that he was entitled to these fees from the plaintiff; and the law will presume that he was entitled to them against his employer, in the absence of an express averment showing the

liability of some third party. The defence concludes with the only phrase in the whole plea which pretends to justify the retention of the plaintiff's money, viz.—"That defendant was entitled to retain the amount of said deposit on account of his auction fees," which statement amounts, in fact, to the general issue. The auctioneer is merely a stakeholder for the parties, and "he contracts," to use Lord Campbell's language, "with the purchaser to return the deposit in case the sale turns out to be void:" *Deller* v. *Prickett and another* (*a*), commented on in *Sugden's V. and P.*, p. 41. Here the plaintiff complains that the defendant holds his money, and the defendant should show his right to retain it. In *Pontet* v. *Magrath and wife* (*b*), Perrin, J., said, "He com-"plains of your having taken his goods, and you should show what "right you had;" and the plea was set aside for not showing this right. This plea is embarrassing, because it puts in issue no material fact. If the defendant have a right to retain the money, he should state the special facts, to enable us to have the opinion of a jury upon their truth, and the right would then be ascertained, as a conclusion of law from these facts.—[RICHARDS, B. The difficulty I feel is this, whether we should not put the plaintiff to the necessity of demurring?]—Pleas like this have been set aside on motion without demurrer: *Dixon* v. *Franks* (*c*); and this case comes fairly with the compass of that authority.

*Thomas Harris*, contra.

If the plaintiff wished to rely upon the fact of the sale having proved abortive, he should have expressly stated it so in the summons and plaint. The Court ought now to assume that the sale was perfected. The action is merely for money had and received for the use of the plaintiff, and to this the plea is a complete answer. The form of the action has been misconceived by the plaintiff, and at any rate there is nothing embarrassing in the defence; because the plaintiff, if he wishes to rely on the fact that the sale proved abortive by the negligence of the auctioneer, or by

(*a*) 15 Jur. 168; S. C., 15 Q. B. 1081.

(*b*) 6 Ir. Jur. 253.

(*c*) 7 Ir. Jur. 64.

M. T. 1857.
*Exchequer.*
EARLY
v.
SMYTH.

the default of James Daly, can raise these points by a replication.—[GREENE, B. The form of action adopted in this case is the usual and the proper form.]

*Close*, in reply.

PIGOT, C. B.

In this case it is doubtful whether the plaintiff would not have adopted a better course if he had demurred to the defence. However, he has not been advised to do so, and he now applies to the Court to set aside the defence as embarrassing. In my opinion, it is embarrassing, because it raises no material issue, and wholly fails to set forth such facts as would justify the retention of the deposit claimed. It must, accordingly, be set aside with costs, with liberty, however, to the defendant to plead again *de novo*.

RICHARDS, B.

I am of the same opinion. The defence is clearly no answer to the plaint. When an action is brought in this form against an auctioneer, to recover the amount of a deposit which he admits he has received, the auctioneer, to justify his retention of the deposit, must (in the absence of any express condition of sale) set out such facts as would be sufficient to justify him in paying the entire purchase-money (if still in his hands) to the vendor of the estate. This plea does not show that the auctioneer would have been justified in paying any portion of the purchase-money to James Daly, and therefore, it is insufficient as well as embarrassing.

PENNEFATHER and GREENE, BB., concurred.

Defence set aside with costs, and liberty to defendant to plead again.

H. T. 1858,
*Exchequer.*

## M'DONNELL *v.* EVANS.

*Jan.* 12.

Where an attorney serves an incorrect copy of his pleadings on the opposite party, the costs incurred thereby will be charged upon him personally.

THIS was an application for the costs of the demurrer to the summons and plaint, and of the argument thereof.

The copy served of the summons and plaint stated that a certain sum was due for "money paid by the plaintiff to the defendant, at his request;" and a demurrer was taken to this, as being consistent with the payment of an antecedent debt by the plaintiff to the defendant. The original record, however, was correct, which was not discovered by the defendant's attorney until after he had filed the demurrer, and given out the briefs thereupon to Counsel; and immediately on discovering the difference between the record and the copy, he served a notice upon the plaintiff's attorney, calling on him to amend the copy served, and to pay the costs then incurred in respect of the demurrer. This had not been complied with, and the demurrer was accordingly proceeded with; and upon its coming on to be heard before PENNEFATHER, B., in the preceding Term, he had overruled it, on account of the record being correct, and had refused to entertain the question as to the costs, except upon a substantive application for the purpose.

*G. O. Malley*, in support of the present application, cited *Alexander* v. *Morrison* (*a*).

*P. Blake* and *Concannon*, contra.

The words even of the copy served show a good cause of action.—[PENNEFATHER, B. The question as to the sufficiency of the pleading is not now open to us.]—But the reasonableness of the demurrer should be inquired into.—[PENNEFATHER, B. Your client was bound to serve a true copy of the summons and plaint, and, if he did not do so, he must take the consequences.—

(a) 9 Ir. Jur. 26.

H. T. 1858.
*Exchequer.*
M'DONNELL
*v.*
EVANS.

RICHARDS, B. If *Alexander* v. *Morrison* is to be followed, these costs must be allowed. In that case, the demurrer was not argued.]—The objection here to the pleading is not one for a demurrer. There is no affidavit of merits here. We are willing to amend the record, and abide by the demurrer.

PIGOT, C. B.

We must act on what was done on former occasions, and treat this record as one which the plaintiff has chosen to have in its present form, and take it as it stands. We must bind him by what he has done, and what he has omitted to do; and as he has, by his act, brought his antagonist into the position of taking a demurrer, he must replace him in the position in which he would have stood if he had been apprised of the actual state of the record. If the plaintiff had sought liberty to amend, he should have paid all the costs incurred up to the point of amendment; and therefore the corollary follows, that he must now pay all the costs up to the present time. The rule is a most wholesome one which we laid down on a former occasion. It is an intolerable nuisance that the time of the Court and of its suitors should be taken up by the neglect of the party conducting the proceedings in the Court. Here is the time of this Court taken up in the argument of this demurrer, and in this application, by the neglect of the conducting party. The costs of this demurrer, up to the day of the notice served by the defendant's attorney, and all costs necessarily incurred since, by the refusal of the attorney for the plaintiff to comply with that notice, must be paid; and, which is the most important part of this order, these costs are to be paid by the plaintiff's attorney, and shall not be charged by him to his client. Let the defendant have ten days to plead, and the order be similar to those made on former occasions.*

* For the form of the order made, see *Alexander* v. *Morrison* (ubi sup.)

H. T. 1858.
*Exchequer.*

## MURRAY *v.* TRIMBLE.

*Jan.* 21.

Interlineations and alterations in affidavits taken before Commissioners must, under the 143rd Order, be mentioned in the jurat. The 141st General Order, which allows alterations to be initialed, refers only to affidavits taken before the officers of the Court.

This was an application that the officer of the Court might enter up judgment by default. The usual affidavit of service of the summons and plaint had been taken before a Commissioner in the country, and contained one or two interlineations (not in material parts); on each side of which the Commissioner had affixed his initials, but the interlineations were not noticed or mentioned in the jurat. The officer had refused, in consequence, to enter up judgment upon this affidavit, considering that, by the 143rd General Order, the jurat ought to refer to the interlineations.

*Tudor*, in support of the application.

According to the practice in the Court of Queen's Bench and in this Court hitherto, the initialing of interlineations by Commissioners for taking affidavits is sufficient. The 141st General Order allows the initialing by the officer, and the 143rd General Order applies to affidavits made by illiterate or blind persons.—[Greene, B.* The first part of the 143rd Order applies to affidavits made by blind or illiterate persons, but the latter part is general. The 141st Order applies to affidavits taken before the officer of the Court, and the 143rd to those taken before a Commissioner in the country.]—The part of the 143rd Order which says that all Commissioners are to guard against interlineations as much as possible, &c., seems to intend that the Order applies to alterations made at the time of taking the affidavit. The practice has hitherto been in favour of what has been done here.

Greene, B.

I should be sorry to sanction any practice which would relax

* *Solus.*

H. T. 1858.
*Exchequer.*
MURRAY
*v.*
TRIMBLE.

one of the General Rules. If it appeared to me that the Rule was substantially complied with, I might allow the application; yet, as these Rules are framed with propriety, I would not lightly allow them to be relaxed. As this motion is of importance as regards the practice of the Court, I should wish it to be mentioned again when the Full Court is sitting.

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At a later period of the same day, the LORD CHIEF BARON and BARON RICHARDS having taken their seats on the Bench, *Tudor* renewed the application.

GREENE, B.

We have considered these two Rules, and are of opinion that this General Order refers to all Commissioners, and is mandatory that the Commissioners shall guard against interlineations, and that, if such be unavoidable, they shall be fully detailed in the jurat. It is very manifest why the Rule should have been made, and we think that the officer ought not to act upon this affidavit. Let the affidavit go down again to the Commissioner, and the jurat be amended by him, by noticing the alterations in it.

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## LYSAGHT *v.* FARMER.

*(Sittings in Banco.)*

*Feb.* 4.

A plea of set-off to a suggestion of breaches upon a judgment for a demand unliquidated in its nature—*Held* bad, notwithstanding an averment that the plaintiff's demand was certain and ascertained, amounting to the sum claimed by the suggestion.

SUGGESTION OF BREACHES.—The condition of the bond on which the judgment was obtained is alleged by the plaintiff to be, that in case the residue of certain lands therein mentioned, called Choheenmilcon, comprised in a certain indenture of mortgage therein mentioned, should be or become insufficient for payment

of a certain mortgage and judgment debt of £835. 10s. 0d., and interest thereon at £6 per cent. per annum, to which the plaintiff was entitled as therein mentioned, and which sum was payable nine months after the death of Mary Lysaght therein named; and the said plaintiff should fail in making the residue of said lands available for payment of said debt and interest; and that the said defendant, his heirs, executors or administrators should well and sufficiently pay to and reimburse the plaintiff, his executors, administrators or assigns, all such sum as he or they should fail to make the residue of said lands comprised in said mortgage available for in payment of said mortgage and judgment debt and interest, not exceeding in the whole the principal sum of £150, with interest on such deficiency, at the rate of £6 per cent. per annum, to be computed from the day said deficiency should occur and be ascertained; then and in such case and thenceforth the said bond, and any judgment to be entered thereon, should be null and void, but that otherwise same should remain in full force and effect. It is then alleged, that the said Mary Lysaght died on the 16th of March 1851, and that the said residue of the said lands did become and were wholly insufficient for payment of the said mortgage and judgment debt and the interest thereon, and that same were, on the 22nd of March 1854, set up and sold, pursuant to the decretal order of Edward Litton, Esq., one of the Masters of Chancery, made in a certain cause in said Court, for the price or sum of £1250, which was wholly insufficient for payment of the said sum due on foot of said mortgage and judgment debt, and that the plaintiff wholly failed in making the said lands available for payment of said debt and interest; and that same were deficient by a sum, to wit, of £500, for payment thereof, of all which the defendant had notice: yet the said defendant did not nor would pay to or reimburse the said plaintiff the sum which the plaintiff failed to make the said lands available for in payment of said debt and interest, not exceeding in the whole £150, with interest, or any part thereof; and that the sum of £150, together with interest thereon at the rate aforesaid, from the 22nd of March 1854, being the day on which said deficiency occurred and was ascertained, were still wholly due and unpaid to the said plaintiff.

H. T. 1858.
*Exchequer.*
LYSAGHT
*v.*
FARMER.

The defendant pleads, that the plaintiff's demand in respect of the said judgment is a certain and ascertained debt, by way of liquidated damages, amounting to the sum of £188. 2s. 10d., as in the said suggestion mentioned; and that the plaintiff, at the commencement of the suit, and then still was indebted to the defendant in an amount exceeding the plaintiff's claim, for certain causes of action and demands mentioned in the said plea, out of which sums the defendant was willing to set off the amount of £183. 2s. 10d. against the plaintiff's claim. To this plea the plaintiff demurs, on the ground that the plaintiff's demand is shown, by the said suggestion of breaches, to be in its nature unliquidated, and one against which no set-off can be had.

*Chatterton*, for the demurrer.

*Attwooll* v. *Attwooll* (*a*); *Luckie* v. *Bushby* (*b*); in the latter of which cases an averment that the amount due was settled at a certain rate, and thereby liquidated, did not uphold the plea of set-off.

*Jellett*, contra.

There is a distinction between a bond passed for securing the performance of continuing acts and those passed for securing the performance of one single act; and this distinction affords an answer to *Attwooll* v. *Attwooll*. Under the 8 & 9 *W.* 3, c. 11, a suggestion of breaches is rendered necessary to ascertain the damages of one act, but the judgment is to continue as a security for future breaches, and in such a case even a set-off may be pleaded: *Collins* v. *Collins* (*c*). The question is, whether the demand may be liquidated or ascertained at the time of plea pleaded; and, if so, the set-off may be pleaded: *Murray* v. *Earl of Stair* (*d*); *Morley* v. *Inglis* (*e*). Here the amount becomes ascertainable upon certain conditions, and "*id certum est quod certum reddi potest.*" The exact sum is ascertained upon the

(*a*) 2 El. & Bl. 23.
(*b*) 13 C. B. 864.
(*c*) 2 Burr. 820.
(*d*) 2 B. & Cr. 82.
(*e*) 4 Bing., N. C., 71.

happening of the conditions upon which it becomes payable: *Low* v. *Peers* (*a*). The jury would have no option to give any damages but the sum agreed on; namely, the £150, with interest: *Collins* v. *Wallis* (*b*); *Cope* v. *Joseph* (*c*). In *Crawford* v. *Stirling* (*d*), the amount for which the guarantee was given, and which was sought to be set-off, had not been ascertained, and therefore the plea was not allowed. *Hutchinson* v. *Sydney* (*e*) shows that if the amount due upon a guarantee be ascertained, it may be set off. The plaintiff here has defined and ascertained the sum due, in his suggestion, and the defendant adopts that amount in his plea. The entire amount due is £150, with interest from the day on which the deficiency is ascertained, and the defendant admits that he is liable to that amount. He admits the largest sum to which he can be liable, and pleads to it a set-off.

*Chatterton*, in reply.

In *Attwooll* v. *Attwooll* (*f*), the sum claimed by the plaintiff was also admitted.—[RICHARDS, B. Was not that a continuing security?—GREENE, B. I doubt whether there be such an admission there. It was admitted that there were transactions by which the amount might be liquidated, but there was no statement of any sum due. The plaintiff claimed generally £100. The defendant merely pleaded a set-off, leaving the question open.]—The amount there was actually ascertained by a judgment. In *Luckie* v. *Bushby* (*g*), the losses were stated to be a certain amount, and the plea was a settlement of the amount by agreement, and a set-off to that account so settled, and the plaintiff admitted this by demurring to the plea. All the allegations in the suggestion of breaches in the present case are matters to be proved, and the nature of the demand requires that it should be examined into. There is only a limitation of the liability here, which does not ascertain the sum.—[GREENE, B. There might be a good deal in that, if the defendant be not precluded by his plea from saying

(*a*) 4 Burr. 2226.
(*b*) 11 B. Moo. 248.
(*c*) 9 Pri. 155.
(*d*) 4 Esp. 206.
(*e*) 10 Exch. 438.
(*f*) *Ubi sup.*
(*g*) *Ubi sup.*

H. T. 1858.
*Exchequer.*
LYSAGHT
*v.*
FARMER.

that that sum was not due.]—*Morley* v. *Inglis* (*a*) is an authority in the plaintiff's favour. *Indebitatus assumpsit* would not lie here, and that is the true test.

PENNEFATHER, B.

I am much afraid that Mr. *Chatterton* is right in this case. I say afraid, because I agree very much with Lord Campbell, in what he says in *Attwooll* v. *Attwooll* (*b*), that the hopes the Legislature will interpose to allow justice to be finally done in such a case. This sufficiently shows, however, what the law is, and therefore we must allow this demurrer.

What struck me at first was, that the plea admitted the sum claimed as actually due; but even if it were so, I think that the nature of the demand is to be attended to, and that such an admission would not help the case.

RICHARDS, B.

This, certainly, is unliquidated matter; and it is open to the jury to consider what the parties are entitled to on the contract.

GREENE, B., concurred.

(*a*) *Ubi sup.* (*b*) *Ubi sup.*

PIGOT, C. B., absent at Nisi Prius.

## SEYMOUR *v.* SCOTT.

*(Queen's Bench.)*

*Nov.* 20, 21.

In an action for penalties, under the 9 *G.* 4, c. 82, ss. 18, 69, against the chairman of the Commissioners for the town of Q., the plaintiff, in one count of the plaint, averred that J. F., one of the Commissioners, was beneficially interested in a contract, whereby he became disqualified as a Commissioner, and that the plaintiff (being duly qualified for that purpose) required the defendant to notify such disqualification of J. F., and that his office was thereby vacant, and also to convene a meeting for the election of a Commissioner in the place of J. F., and to proceed thereon as directed by the Act. Breach, that the defendant neglected to notify such disqualification, and to convene such meeting. Demurrer, because the above count contained no averment that a declaration of vacancy had been made, and that therefore the duty of the chairman had not arisen, and no penalty had been incurred.—*Held*, that it is unnecessary that a meeting of the Commissioners should be convened for the purpose of declaring the vacancy, prior to the meeting for electing a new Commissioner.

*Per* LEFROY, C. J., CRAMPTON and MOORE, JJ.; a declaration of vacancy by a meeting of the Commissioners is unnecessary.

*Sed per* PERRIN, J., *dubitanter*, such declaration is necessary, but may be made at the same meeting by which the new Commissioner is elected.

ACTION for penalties, under 9 *G.* 4, c. 82, ss. 18, 69. Count.—Plaintiff complains that the defendant is indebted to him in the sum of £100: for that, after the passing of the Act of Parliament made and passed in a Session of Parliament holden in the 9th year of his late Majesty King George the Fourth, entitled, "An "Act to make provision for the lighting, cleansing and watching "of cities, towns corporate and market towns in Ireland, in certain "cases," and after the town of Queenstown, hereinafter mentioned, was brought under the provisions of the said Act, and Commissioners were elected in the said town, for carrying the said Act into execution, he, the defendant, being one of the said Commissioners, was elected to be their chairman; and the plaintiff avers that, while the defendant was such chairman of the said Commissioners, one Joseph Fitzgerald, who was one of the said Commissioners so chosen and elected for the carrying of the said Act into execution, as aforesaid, became and was directly concerned and beneficially interested in a certain contract then existing, and made between the said Commissioners, and certain persons trading under the style of "The Queenstown Gas Company (limited)," for supplying and lighting the said town of Queenstown with gas, and which said contract was made with the said Commissioners for the purposes

M. T. 1857.
*Queen's Bench*
SEYMOUR
*v.*
SCOTT.

of the said Act, he the said Joseph Fitzgerald being the holder and proprietor of shares in the said Company, and being so directly concerned and interested therein: and the plaintiff avers that, by by reason of the interest of the said Joseph Fitzgerald in the said contract, he became and was disqualified to act in his capacity as such Commissioner; and the plaintiff avers that the plaintiff, being a person included in the registry of voters for the election of the said Commissioners in said town, under the said Act then in force, required the defendant, to wit, upon the 12th day of January 1857, as such chairman, to notify that the said Joseph Fitzgerald was disqualified to act in his capacity as such Town Commissioner, and that his office was thereby vacant, and required the defendant, as such chairman, to convene a meeting for the election of a new Commissioner in his place, and to proceed thereon as directed by the said Act; and the plaintiff avers that the defendant, being such chairman as aforesaid, not regarding the said Act, neglected to notify such disqualification, and to convene such meeting as aforesaid, whereby the said defendant forfeited to the plaintiff, &c.

The defendant demurred to this count, because it was not therein stated or averred that the place of the said Joseph Fitzgerald, as such Town Commissioner, was declared vacant, pursuant to the provisions of the said statute; and because it was not thereby averred, or sufficiently shown, that a vacancy had happened or occurred as to the said place of said Joseph Fitzgerald; and because it was not thereby shown that the defendant refused or neglected, upon the occurrence of any vacancy among said Commissioners, to notify same, and to convene a meeting for the election of a new Commissioner.

*H. E. Chatterton* (with him *R. Deasy*), in support of the demurrer.

By the 9 *G.* 4, c. 82, s. 69, it is provided that, upon a Towns Commissioner becoming beneficially interested in a contract, he shall be disqualified to act as a Commissioner, and his place "*shall be declared* vacant." There is no averment in the plaint of such

declaration as required by the Act, and, until that has been duly made, the duty of the chairman does not arise, and the defendant therefore has not incurred the penalty.—[CRAMPTON, J. How is the declaration to be made?]—By resolution of a meeting of the Commissioners: if not, there are no means of satisfying the words of the Act. The duty of the chairman is defined by sections 16 & 17; the 16th section applies to the triennial vacancies in ordinary course, and the 17th section to casual vacancies, in the event of which, "*within fourteen days next after a vacancy shall so happen*," the chairman is to summon a meeting for the purpose of electing a new Commissioner; but the 17th section is, in the present case, to be connected with the 69th section, which requires a preliminary declaration of vacancy to be made. There are other sections which throw some light upon this declaration, because a distinction is drawn by the Act between the cases where a vacancy occurs *ipso facto*, and where a declaration of vacancy must be made. By the 24th section, a fine is imposed upon any Commissioner who shall neglect duly to attend the monthly meetings; and if he fails to pay the fine within ten days after a personal demand upon him for that purpose, "*he shall thereupon cease to be, and shall be disqualified from acting as, such Commissioner;*" but in other cases a declaration of vacancy is expressly required. Thus by the 20th section, a Commissioner is disqualified if he fail to attend one of the three first meetings, "*and his place shall be declared vacant;*" and this declaration must necessarily be made at the discussion mentioned in the same section, and must be the act of the other Commissioners, after due consideration whether sufficient cause is shown for the non-attendance. Again, by the 69th section, upon the disqualification of a Commissioner, by becoming beneficially interested in a contract, his "*place shall be declared "vacant, and shall be supplied as by the Act directed in case of "a vacancy by any other cause:*" the declaration thus becomes a condition precedent to the proceeding to a new election. The words "*upon the occurrence of any vacancy*," in the 18th section, under which this action is brought, refer to the declaration required by the 69th section; and the fourteen days limited by the 17th

M. T. 1857.
*Queen's Bench*
SEYMOUR
*v.*
SCOTT.

section, within which the meeting for the election is to be called, must date from the declaration of vacancy. That this is the true construction of the Act is further supported by considering how much confusion and uncertainty would prevail, if the chairman were bound to proceed to an election upon the mere representation of a householder, instead of upon a resolution of the Commissioners, after proper discussion of the matter by them. No such declaration is averred here, and therefore the defendant has not incurred the penalty imposed by the 18th section.

*J. Clarke* and *E. Sullivan*, contra.

The policy of the Act is to prevent the Commissioners from engaging in contracts concerning the matters entrusted to their care; and with this object, by the 23rd section, the public at large are empowered to come in, and to hold them in check; but if the argument on the other side be correct, the penalties imposed by the statute are rendered nugatory, and the Act cannot be worked out in practice. It is admitted upon this argument that the taking the shares in the Gas Company by Fitzgerald is a disqualification, and that, by the 69th section, he "*thereupon became, and was thereby declared to be, disqualified.*" Upon the "*occurrence*" of this disqualification, the plaintiff required the chairman "*to notify* "*the same, and to convene a meeting for the election of a new* "*Commissioner*," as provided by the 17th and 18th sections. The argument on the other side must go to this length, that, if the chairman has not notified the disqualification and called the meeting, there is no vacancy.—[PERRIN, J. Who is to declare the disqualification?]—By the 69th section, upon the fact becoming known, the disqualification *ipso facto* arises, and then, by the 17th section, the chairman is to call a meeting within fourteen days, and make known the disqualification. The words "*shall be declared*," in the 69th section, are equivalent to "*shall be;*" if this were not so, the manner in which the declaration is to be worked out would have been provided by the Act.—[MOORE, J. Your complaint is, that the chairman neglected your requisition, and did not call a meeting. If the chairman is justified in not convening a meeting,

every disqualified person may continue to act as a Commissioner.]— Next, even admitting that a declaration of vacancy is necessary, as contended for by the other side, it may be made at the same meeting by which the vacancy is supplied.—[LEFROY, C. J. There is no difficulty that I can see; if the chairman either knows the fact himself, or has received proper information of it, a meeting must be called, and, if the chairman does not do so, he is guilty of a violation of his duty.]

*R. Deasy* replied.

LEFROY, C. J.

In this case it is said, that the declaration of vacancy which has been alluded to, and suggested to be a necessary preliminary, must be made at one of the monthly meetings, or upon some other occasion when the Commissioners meet. But if that were so, what is to become of those sections of the Act which provide in terms for the fact admitted to have existed here, that is, actual disqualification upon the grounds of becoming beneficially interested in a contract? What is to become of the section which declares that a Commissioner, under such circumstances, ceases to be qualified, and is no longer to be considered entitled to act as a Commissioner, and that his place is to be filled up, in order that the body may act efficiently? The body of Commissioners must consist of a certain number. The Act ascertains this number (*a*), and also provides for the mode of electing Commissioners (*b*), and filling up the vacancies (*c*), and makes it imperative upon the chairman—renders him liable to a penalty, if he neglect or refuse to convene a meeting to fill up an existing vacancy, either at the time appointed by the Act for the election of new Commissioners, or upon his being thereunto required by a person designated by the Act as qualified to make such requisition (*d*), and which requisition the chairman must obey. There are two cases contemplated by the Act, namely, neglect, and refusal. If the chairman knows nothing about the

(*a*) Sec. 11.
(*b*) Sec. 12.
(*c*) SS. 14, 16, 17.
(*d*) Sec. 18.

M. T. 1857.
*Queen's Bench*
SEYMOUR
*v.*
SCOTT.

matter, he cannot be guilty of neglect; but, upon the other hand, if he has ascertained the fact, or if he knew it upon the information of a person authorised to give him the information, and not only authorised to give him the information, but also to require him to convene a meeting for the purpose of filling up, not the representation of a vacancy, but an actual vacancy (which the demurrer admits to have existed)—which it was his duty to fill up, then he is bound to do so, and his refusal renders him liable to a penalty. If the 18th section of the Act means anything, it provides for this precise case, and therefore, so far as my judgment goes, this demurrer must be overruled.

CRAMPTON, J.

This case is clear. The demurrer admits the fact of the incapacity of this Commissioner, of the vacancy, and that the defendant was aware of the facts. Well then, it follows that there has been a default upon the part of the chairman, unless the argument be well founded, that there should be a preliminary general meeting before the chairman is to act: but that is not the meaning of the Act of Parliament. There is a responsibility and a duty cast upon the chairman; but what is that duty? When information is given to the chairman, of disqualification or vacancy, his first duty will be, to make inquiry into the case (suppose of death, or other vacancy), and to satisfy himself of the fact. This inquiry he may make personally. The statute does not compel him to call a meeting to inquire into the fact, it does not compel him to call a meeting of inquiry: he may take the opinion of a meeting if he be in doubt or difficulty: but it is upon his own responsibility that he is to pronounce whether there is a vacancy or not; and when he thinks there is a vacancy, he is bound, under the statute, to issue his summons for a new election. I am satisfied that that is the true construction of the Act of Parliament.

PERRIN, J.

I entertain doubts whether, under the 69th section of the Act, there is any vacancy until it is declared: but I do not see any

M. T. 1857.
*Queen's Bench.*
SEYMOUR
*v.*
SCOTT.

reason for holding, that there should be first a convening of the Commissioners, for the purpose of declaring the vacancy, and another convening for the purpose of electing: particularly, if we advert to the 17th section, there is no reason why there should be two meetings. But, at the same time, I consider that the declaration of the vacancy is a necessary preliminary, or at all events, I doubt whether it is not necessary.

MOORE, J.

I concur with my LORD CHIEF JUSTICE, and my Brother CRAMPTON.

Demurrer overruled.

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NOTE.—By 20 *Vic.*, c. 12, it is provided that, from and after the 21st of March 1857, no person being a Commissioner for the execution of the Act 9 *G.* 4, c. 82, (*Ir.*), or a treasurer or clerk of any Commissioners acting under the said Act, shall be subject or liable to any forfeiture, loss of office, disqualification, or penalty, by reason of such person being a proprietor of a share or shares, or a holder of any office or employment in any Joint-stock Company which may have made, or may make, or enter into, any contract with the Commissioners of such Town, acting under the said Act, and no contract entered into between any such Company and such Commissioners shall be void or voidable by reason of any such Commissioner, clerk, or treasurer being interested in such Company, as a shareholder or officer in the same.

Section 3.—Provided always that no Commissioner interested as a shareholder, or holding any office or employment in any Company, shall, at any meeting of the Commissioners, take part in or vote upon any arrangements, or any contract with such Company.

## AMMARMANN *v.* ROBINS.*

H. T. 1858.
*Jan.* 14.

To an action for goods sold and delivered, for goods bargained and sold, for work and materials, and for money found due on account stated, the defendant pleaded that the goods were not sold and delivered to the defendant, as in the summons and plaint alleged.—*Held*, that this defence is insufficient, as covering only part of the cause of action.

PLAINT for goods sold and delivered by the plaintiff to the defendant, for goods bargained and sold by the plaintiff to the

* *Coram* CRAMPTON and PERRIN, JJ.

H. T. 1858.
*Queen's Bench*
AMMARMANN
*v.*
ROBINS.

defendant, and for work done and materials for the same, provided by the plaintiff for the defendant, and for money found to be due from the defendant to the plaintiff, on an account stated between them.

Defence.—That the goods were not sold and delivered to the defendant, as in the summons and plaint alleged.

*F. Smith* moved to set aside this defence, as embarrassing. It purports to be an answer to the whole causes of action in the summons and plaint mentioned, but in fact only answers part of it. This defence traverses only that the goods were sold and delivered, leaving untraversed the remainder of the plaint. Under the old system of pleading, this defence would have been bad on special demurrer. In *Putney* v. *Swann* (*a*), where a declaration contained one count on a bill of exchange against the acceptor, and a second count on an account stated, and the defendant pleaded that he did not accept the bill of exchange in the declaration mentioned, taking no notice of the count on the account stated, this was held bad, on special demurrer.

*Charles Coates*, contra.

This defence is good. There are four different causes of action stated in the plaint. The defendant had a perfect defence to one of these causes of action: he leaves the others untraversed, and it was the duty of the other side to mark judgment as to those so untraversed, and go to trial as to the cause of action which is traversed.—[CRAMPTON, J. As I understand this defence, it is a defence to the entire action; but it traverses only so much of the plaint as claims for the goods sold and delivered; the officer probably would not mark judgment.—PERRIN, J. The Common Law Procedure Act 1853 * itself gives a form of defence].—Even under the old system of pleading, it was only ground of special demurrer; and here it is plain only one cause of action is traversed; and the Court will hesitate to say that it is intended to be a defence to the whole cause of action.

(*a*) 2 M. & W. 72.

* Sched. B., No. 2.

CRAMPTON, J.

We must set aside this defence. It undertakes to defend the whole action, and then traverses only a portion of the demand. Under the old system of pleading, this defence would have been the subject of demurrer. The defence therefore must be set aside, with costs.

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## GRAINGER *v.* FINLAY.*

*Jan.* 12.

In an action for the disturbance of a right of way, the plaint stated that "the defendant wrongfully and injuriously kept and continued a certain vicious and dangerous dog upon the lands of the said defendant, and close to the said way, so that the plaintiff and his family, &c. could not safely or securely, or without dread or apprehension, pass and re-pass along such way, whereby plaintiff was greatly disturbed in the use of the same." *Held*, bad, on demurrer, for not averring that the defendant knew that the dog was of a vicious and mischievous nature, or that he kept it upon the way, or under such circumstances as to cause reasonable danger or apprehension in the use of the way.

Leave to amend the plaint refused.

THIS was an action for interrupting a right of way. The plaint stated that the plaintiff was, and still is, lawfully possessed of a certain way (in the plaint described), over and across *the lands of the defendant*, and into a certain plot of ground of the said plaintiff, and so back again from the said plot of ground over the said lands of the said defendant; such way to be used by the said plaintiff for himself and his family, domestic servants, and visitors for the time being residing in the dwelling-house of the said plaintiff, to pass and re-pass on such way; yet that the defendant, for a long time before the commencement of the action, *wrongfully and injuriously kept and continued a certain vicious and dangerous dog upon the said lands of the said defendant*, and *close* to the said way; so that the plaintiff and his family, domestic servants and visitors residing in his dwelling house, *could not safely or securely, or without dread or apprehension*, pass and re-pass along such way; whereby the said way was greatly obstructed, and the plaintiff greatly disturbed in the lawful use of the same.

* *Coram* LEFROY, C. J., CRAMPTON and PERRIN, JJ.

H. T. 1858.
*Queen's Bench*
GRAINGER
*v.*
FINLAY.

Demurrer, because it is not therein alleged how the plaintiff is possessed of the said alleged way therein mentioned, or whether he was entitled thereto, by grant or prescription, or in what manner; nor is any obstruction of the said alleged way stated in said plaint; nor does the act complained of, which is a lawful act, amount to any obstruction of the said alleged way; nor is it averred that plaintiff or his family, domestic servants or visitors were prevented using the said way by said alleged obstruction; nor is it averred that defendant knew said dog to be a vicious or dangerous dog, or kept same for the purpose of obstructing said alleged way, or that the dog in said plaint mentioned ever came thereon.

The defendant also pleaded, that said dog was kept by him on his own land, for the protection of his property, and in such manner that the plaintiff and his family, domestic servants and visitors could safely and securely, and without reasonable cause for dread or apprehension, pass and re-pass along said way. The defendant also traversed the fact of keeping a vicious and dangerous dog close to the way.

*Harrison* (with him *D. Lynch*), for the demurrer.

This is an action for the obstruction of an alleged right of way; but the plaint is defective, in not stating how the plaintiff became entitled to the right of way, whether by prescription, grant, &c. The plaintiff avers that the defendant kept a vicious dog, by means of which his right of way was obstructed, but he does not aver that the dog ever came upon the way.—[CRAMPTON, J. This appears to me to be a kind of *quia timet* action.]—Yes; no obstruction has been shown; the keeping the dog upon the defendant's own land close to the way is no such obstruction. Next, there is no averment that the defendant knew that the dog was vicious. The difference between keeping a dog, or such domestic animal, and animals naturally vicious, is laid down in the fourth objection in the case of *Rex* v. *Huggin* (*a*) thus:—"There is a difference "between beasts that are *feræ naturæ*, as lions and tigers, which "a man must always keep at his peril, and beasts that are *mansuetæ*

"*naturæ*, and break through the tameness of their nature, such as "oxen and horses. In the latter case, an action lies if the owner "has had notice of the quality of the beast; in the former case, "an action lies without such notice." The *scienter* must be averred, and is the gist of the action. *Jackson* v. *Smithson* (*a*) shows that it is not the negligent keeping, but the knowledge of the vicious nature of the animal, which renders the party liable: *Gerard* v. *Dickenson* (*b*).—[LEFROY, C. J. Is there any of those cases without an allegation of loss or injury sustained?]—None; nor is there any allegation of any loss pretended to be sustained by the plaintiff: *Com. Dig.*, tit. *Action upon the case, for a Nuisance*, C; *Selw. N. P.*, p. 1119, 11th ed. The demurrer therefore should be allowed.

*Joy* and *May*, contra.

This is a sufficient mode of alleging possession: *Coryton* v. *Lithebye* (*c*). This is not an action for keeping a vicious animal, but for the obstruction of a right of way, with an allegation of the mode of obstruction, viz., by keeping the dog so close to the way that the plaintiff and his family could not pass along the way. A party complaining of an obstruction of a right of way need not set out the obstruction: *Com. Dig.*, tit. *Action upon the case, for Disturbance*, A 3. We say that the dog was kept so close to the way as to obstruct our right of way; that is a nuisance to, and an obstruction of, our right of way: *Rolle Abr.*, tit. *Nuisance*, G, p. 140—"If the tenant of the land plough up the soil over "another's way, this is a nuisance to the way, because it is not "as easy to him as before." It is conceded that if the dog were placed upon the way, this action would be maintainable; then is it to be said, that the defendant may place his dog so close to the way as to produce the same result, and yet not be liable to an action?—[PERRIN, J. Is the action brought here, because the party cannot pass along the way without dread or apprehension?]—If the keeping the dog close to the way create such terror that persons passing along the way cannot do so as before, that is an

(*a*) 15 M. & W. 563. (*b*) 4 Co. Rep. 18 *b*.
(*c*) 2 Wm. Saund., 6th ed. 114, *n*.

H. T. 1858.
*Queen's Bench*
GRAINGER
*v.*
FINLAY.

obstruction of our right of way.—[CRAMPTON, J. The dog might be chained so as to reach the way.]—Yes; our safety is interfered with.—[LEFROY, C. J. Do you allege a fact which must of necessity produce an obstruction, by stating that the dog was kept near the way, without averring that the condition of the dog was such that he might do injury to persons passing? Suppose the defendant's house was near the way, and that he kept the dog there, would not that be consistent with your plaint?]—We state that a vicious animal is kept so close to the way as to interfere with the security of persons passing on that way. The question of obstruction is one for the jury. Next, it is said that we should have alleged the *scienter*. This is a misconception; we do not bring this action against the defendant for keeping a vicious and dangerous dog, but for keeping such a dog so near the way as to interfere with our right of way. We have a right, either to remove the dog, or to bring an action. In civil cases, the law regards rather the damage sustained by the party wronged, than the intent or malice of the wrong-doer; *Bac. Max.*, No. 7, alluded to by Lord Kenyon in *Haycraft* v. *Creasy* (*a*). Several cases are put in *Lambert* v. *Bessey* (*b*), where it is said:—"In all civil acts the "law doth not so much regard the intent of the actor as the loss "and damage of the party suffering; for though a man do a lawful "thing, yet if any damage do hereby befal another, he shall answer "it, if he could have avoided it. I have land through which a "river runs to your mill; I lop the fallows growing on the river "side, which accordingly stop the water so as your mill is hindered, "an action lies."—[PERRIN, J. I still think the difficulty is this, the action is for keeping a dog so that you cannot pass along the way without dread or apprehension; it is not stated whether the dog was loose or not. If the words "*without dread or apprehension*" were struck out, your plaint would be greatly improved; as it now stands, if you proved at the trial that the plaintiff and his family were really frightened, that would entitle you to recover.]—In the case of *Glover* v. *The North Staffordshire Railway Company* (*c*) where

(*a*) 2 East, 92, 104. (*b*) T. Raym. 421.

(*c*) 16 Q. B. 912; S. C., 20 Law Jour. 376 (Q. B.)

a man's house was approached by a private way, which a railway crossed, and gates were placed upon it, the key of which was kept by a servant of the Company, and the owner of the house, Erle, J., says (p. 923):—"The trains cross the ways, producing danger to "those using them; so that the case is, as if a fierce animal were "placed on the road." So here, if the dog be placed in such a way that the plaintiff's safety is interfered with, and he or his family feel apprehension that is an interference with his right of way, which entitles him to maintain this action: *Bac. Abr.*, tit. *Action on the case*, F. We have stated a *prima facie* case, that we have been obstructed, and the mode in which we have been obstructed. That is sufficient. If this be not an obstruction, a right of way may at any time be interrupted by an easy device, without giving any remedy whatever for the injury.

*D. Lynch*, in reply.

There is no precedent that, in such an action as this, you need not allege the mode of possession. There is nothing unlawful in the defendant's keeping a vicious animal, but it must be alleged that he knew of its vicious nature; that is the gist of the action. The leading case on *scienter* is *Buxendin* v. *Sharp* (*a*). The plaint does not allege that the dog caused reasonable dread and apprehension. Every allegation made by the plaint is consistent with the defendant's right to keep the dog.

LEFROY, C. J.

In this case we are all of opinion that the demurrer must be allowed. It is very true, we are to pay regard to the safety of the plaintiff, and to the safe enjoyment of his right of way; but we must also have regard to the defendant's right to the full enjoyment of his land. The plaintiff complains of a disturbance of his right of way, in such a manner as to affect his safety in the use of it, and also that it was disturbed in such a manner as to excite fear and dread, so that he could not conveniently use the way. The land

(*a*) 2 Salk. 662.

H. T. 1857.
*Queen's Bench*
GRAINGER
*v.*
FINLAY.

through which the way passes is stated to be the land of the defendant. Now the defendant has as good a right to the enjoyment of his land, in every way consistent with the law, as the plaintiff has to the right of way; and, in order to deprive him of it, the plaintiff must show that the defendant has been using the land illegally, and to the prejudice of the enjoyment by the plaintiff of his right of way. Has the plaintiff shown any illegal use of the land? or does his averment establish that illegal use clearly and plainly, by alleging that the defendant has kept upon his land a dog, a dangerous and mischievous animal? With respect to the nature of the animal, it is not alleged that the defendant knew that it was mischievous; and, as it would be illegal to keep an animal accustomed to do injury, we are not to presume, without an averment, that he did keep that animal, knowing it to be such; there is then no averment whatever to establish the illegality of keeping that animal. Then, as to the defendant keeping the dog upon his land, there is no illegality in keeping the animal on his own land, because there was a way passing through it. There are many ways in which the defendant might keep the dog; if, for instance, he kept it locked up, or if he kept it in such a manner as not to expose others to injury. It is not averred either that he kept the dog upon the way, nor under such circumstances as to prevent the use of the way. The allegation in the summons and plaint is, that the defendant kept the dog close to the way, and then it says, "so that the plaintiff could not safely or securely, or without dread or apprehension," use the way. There is no connection, no necessary connection, between the plaintiff being unable to use the way with safety, or without fear or dread, and the mode in which the dog was kept upon the land of the defendant; no necessary connection whatever between the mode of the defendant's keeping the dog upon his land, and the producing of a want of safety, and necessary dread and fear, on the part of the plaintiff; and I take it that the plaintiff, before he can call upon the defendant for his defence, must show sufficient cause of action, by his averment of matter of fact; and if his cause of action be a result deducible from fact, he must charge upon the defendant such matters of fact

as lead, by reasonable and necessary consequence, to that result But in this plaint there is nothing said as to the nature of the animal kept, nor as to the mode of keeping it, that so leads either to the danger or apprehension complained of. Besides, it is stated disjunctively that he could not go with safety, *or* without fear and apprehension. If the parties were allowed to go to trial upon this summons and plaint, the plaintiff would have a right to insist at the trial that he was entitled to a verdict, if he proved either one or other, even if he had made no case as to interference with his safety, if he showed that he or his family felt dread or alarm. The family might have felt alarm; a very little might frighten them; that would depend on the habits of the family. It is not the feeling of alarm, but the just occasion given for the feeling of that alarm, which is the ground of action. There is nothing shown here to give just occasion for fear, or just apprehension of danger, so as to interfere with the plaintiff's right of using the way. This demurrer must be allowed, because, in truth, no substantial cause of action has been stated; and if this proceeding were allowed, it would come to this, that no man could keep a dog on his own land under any circumstances, even if locked up, without being exposed to an action by any person having a right of way over the land. We must consider what might be the consequences of allowing this cause of action without sufficient grounds.

CRAMPTON, J.

I think this plaint does not state any obstruction in point of law whatever. This is, as I threw out in the course of the argument, a *quia timet* action; or, in fact, it may be termed a possibility of obstruction, but not amounting to anything like an obstruction.

PERRIN, J., concurred.

*Joy* applied for liberty to amend the summons and plaint, but the Court refused to grant it.

H. T. 1858.
*Queen's Bench*

## ALCOCK *v.* HURLEY.*

*Jan.* 11.

Plaint for £64. 6s. 9d., for goods bargained and sold, and for goods sold and delivered, and for money found to be due on an account stated. Defence, that the money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant, and for goods sold and delivered by the plaintiff to defendant, and for money found to be due from defendant to the plaintiff, on accounts stated between them, was of the amount of £46. 15s. 0d., and no more; and that the said sum of £46. 15s. 0d. has been paid by the defendant to the plaintiff, and is sufficient to satisfy the plaintiff's demand.—*Held*, bad, as amounting to the general issue.

THE summons and plaint stated that the defendant is indebted to the plaintiff in the sum of £64. 6s. 9d., money payable by defendant to plaintiff, for goods bargained and sold by plaintiff to defendant, and for goods sold and delivered by plaintiff to defendant, and for money found to be due on an account stated.†

Defence.—That the money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant, and for goods sold and delivered by the plaintiff to defendant, and for money found to be due from the defendant to the plaintiff on accounts stated between them, was of the amount of £46. 15s., and no more; and that the said sum of £46. 15s. has been paid by the defendant to the plaintiff, and is sufficient to satisfy the plaintiff's demand.

*O'Riordan* moved to set aside this defence.

There is a form given in the Common Law Procedure Act, which the defendant has not followed. This is the worst form of the general issue; under it the defendant might prove that the goods were not bargained and sold, or that they were bargained and sold, and not delivered, or a release, or indeed any defence.

*Fogarty*, contra.

This plaint is informal; three paragraphs are united in one, whereas there should be a distinct sum stated as claimed under each. The case of *Hughes* v. *Thorpe* (*a*) is exactly in point, to show this. In that case, Parke, B., says:—"In order to constitute

(*a*) 5 M. & W. 656.

* *Coram* LEFROY, C. J., and CRAMPTON, J.

† The plaint in this case was not settled by Counsel.

"an account stated, there must be a statement of some certain "amount of money being due."—[LEFROY, C. J. If there be ambiguity, that is a good ground for your objecting; but unless the words are precisely the same, that case is no authority.]—I must plead one plea to the whole plaint, and I have pleaded an issuable plea; and it is impossible to plead to each paragraph separately, because it is uncertain what amount is claimed on each.

LEFROY, C. J.

It is not enough to plead an issuable plea, if, under that plea, the parties may give in evidence two or three defences. The object of the Act was to eliminate the issue; the defence should be made accordingly, so as to leave the parties in no doubt as to what is to be tried. You must amend your defence.

Leave to amend in two days, on payment of costs.

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## THE QUEEN, at the prosecution of JOHN WARREN PAYNE,

*v.*

## SAMUEL HUTCHINS.*

*Jan.* 21.

A suitor, conducting his own case at Quarter Sessions, is not privileged, if he use towards his opponent terms calculated to produce a breach of the peace.

DEASY, for the prosecutor, had, upon a day this Term, obtained a conditional order for leave to file a criminal information against the defendant.

It appeared by the affidavits that both the prosecutor and defendant were Justices of the Peace for the county of Cork, and that an ejectment had been brought by J. W. Payne, as agent of the Earl of Bantry, against the defendant, at the Quarter Sessions holden at Skibbereen in the county of Cork, on the 3rd of November 1857. The case was heard and dismissed, upon the ground that notice of the ejectment had not been duly served upon the defendant at his place of residence. The case having concluded, the defendant

* *Coram* LEFROY, C. J., CRAMPTON and PERRIN, JJ.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
HUTCHINS.

said:—"Mr. Payne owes me rent for several years past, a much "larger sum than I owe Lord Bantry. He refused to answer the "letters written to him, or to settle his account, and I expect to be "met by the Statute of Limitations. When I told my attorney to "proceed against him, the answer I got was the service of this eject-"ment. I never knew a more gross and abominable fraud." To this the prosecutor replied:—"There is no foundation for the impu-"tations of Mr. Hutchins, and, as I am acting under my solicitor's "advice, I shall not make any reply here." Whereupon the defendant rejoined:—"That is the most prudent thing you can do; you never got better advice;" which was alleged by the prosecutor to be intended to provoke a breach of the peace. This, however, was negatived by the defendant. It also appeared that the prosecutor had tendered to the defendant's solicitor a cheque for the rent alleged to be due by him, but which cheque was returned subsequently to the hearing of the case at the Sessions.

*G. Fitzgibbon* (with him *P. Burrowes*) now showed cause, and contended, amongst other grounds, that the defendant was privileged to use the words in question, as he was conducting his own case at the Sessions, and it being denied that he intended to provoke the prosecutor to a duel. Counsel would have been at liberty to use these words in reference to the service of the ejectment. The privilege of Counsel is only the privilege of the client.

Serjeant *Deasy* (with him *R. R. Warren*), contra.

LEFROY, C. J.

This order must be made absolute, if for no other purpose than to put an end to any such idea of privilege existing in such cases. It is a violation of the very decorum of the Court, in the presence of a Bench of Magistrates, where justice is administered; and it is aggravated by the fact that the cause was then at an end; even pending the cause such language cannot be tolerated.

Order made absolute, but no further proceedings to be taken thereon, the defendant paying all costs.

## SEDLEY *v.* M'GOWAN.*

*Jan.* 15, 28.

A deputy, appointed by a Returning-officer, under the 13 & 14 *Vic.*, c. 68, s. 14, is not, by virtue of such appointment, an independent functionary, but remains, during the continuance of the election, subject to the supervision, and under the control of, and is bound to act upon the instructions from time to time given to him by such Returning-officer. Therefore, when at an election a deputy so appointed improperly rejected the plaintiff's vote, the defendant, as Returning-officer, though called upon, refusing to review the decision of his deputy, or to hear the matter discussed before him, on the ground that he had no jurisdiction under the Act of Parliament, is liable in an action for such rejection of the plaintiff's vote by his deputy.

A refusal to nonsuit is not the ground of an exception. An exception lies to any rule made by the Judge at the trial, or to what he says in his charge, or any part of it; but not to what he does not say or refuses to say. The exception should be for *misdirection*, not for *non-direction*. The refusal of the Judge to withdraw from the consideration of the jury evidence not objected to at the time of its reception is not the ground of an exception.

This was an action brought for the recovery of the sum of £500 damages, for the rejection by the defendant, as Mayor and Returning-officer of the borough of Sligo, of the plaintiff's vote, at an election of a burgess to serve in Parliament for the borough of Sligo, on the 1st of April 1857. To this, the defendant pleaded, first, that the defendant, at the issuing of the writ, was Mayor and Returning-officer of the borough of Sligo, and, as such, received the precept from the Sheriff, for the purpose and object as in the plaint alleged; and that, in pursuance of the powers vested in him by his said office, and in discharge of his duty, he appointed Joseph Foley his deputy, and Hugh Kenny clerk, to take the poll in said booth, and administered to them the oath as prescribed by the statute. That the respective candidates nominated their agents, of whom the plaintiff was the agent of John A. Wynne, one of said candidates. That the plaintiff's vote was objected to, on the ground of his being the paid agent of Wynne; which objection having been considered valid by the defendant's said deputy, he rejected the plaintiff's vote; which decision of his said deputy, the defendant, when requested to adjudicate thereon, declined to overrule, or to enter into the decision of his said deputy, and that he did so without fraud or malice, and *bona fide*, and not intending to deprive the plaintiff of any just or legal right.

The second and third defences traversed the plaintiff's right to vote; the fourth defence traversed the request to the defendant to

* *Coram* Crampton and Perrin, JJ.

H. T. 1858.
*Queen's Bench*
SEDLEY
*v.*
M'GOWAN.

decide upon the improper rejection of the plaintiff's vote; the fifth defence traversed the fraudulent conduct imputed to the defendant. Sixth defence:—That, before the commencement of the poll, the defendant appointed Joseph Foley his deputy, and gave him all necessary instructions, and delivered to him a printed list of voters. That Foley did preside as deputy, and, while presiding, was alone authorised to reject or admit votes. That Foley did reject the plaintiff's vote, in discharge of his duty as such deputy, and being solely entitled to determine as to the votes. That defendant, being Returning-officer, and having appointed Foley to preside at the said booth, did not reject the vote of the plaintiff.

The issues were as follow:—First; whether the defendant wrongfully, fraudulently, maliciously and wilfully, refused to decide that the vote of the plaintiff had been improperly rejected by the said deputy, Joseph Foley, as in plaint alleged? Second; whether John A. Wynne, one of the candidates of said election, did nominate and appoint the plaintiff as his agent in the booth, in summons and plaint alleged? Third; whether the said John P. Somers, a candidate at said election, did nominate Laurence M'Ternan as his agent in said booth? Fourth; whether the said Laurence M'Ternan did object, as such agent, to the deputy receiving the plaintiff's vote at said election, on the ground of his being the paid agent of John A. Wynne? Fifth; whether the adjudication rejecting the plaintiff's vote, in said first defence stated, was made without fraud or malice, and *bona fide* believing it to be a just and legal objection, regarding the vote of the said plaintiff? Sixth; whether the plaintiff was entitled to give his vote for choosing a burgess for the said borough, as in the summons and plaint alleged? Seventh; whether the plaintiff's vote, at the time of tendering same, should have been admitted, and allowed to have been entered and recorded, as in summons and plaint alleged? Eighth; whether, before the poll-book at the close of the day's poll was inclosed and sealed, defendant was required, on behalf of the plaintiff, to decide that the vote of plaintiff had been improperly rejected? Ninth; whether the defendant acted fraudulently or maliciously, or with intent to injure or damnify the plaintiff, or to hinder or disappoint him of his privilege, as in summons

and plaint alleged? Tenth; whether the said deputy, Joseph Foley, rejected the vote of the plaintiff in accordance with his duty as deputy? Eleventh; whether defendant rejected plaintiff's vote, as in summons and plaint alleged?

The action was tried before the LORD CHIEF JUSTICE of the Queen's Bench, at the Nisi Prius Sittings after Trinity Term, on the 25th of June 1857, and two following days. Evidence was adduced, on the part of the plaintiff, of the rejection by Foley, the defendant's deputy, of several persons as voters for J. A. Wynne; also evidence of the omission to record, the refusal to reject, and the act of recording, as also of the correction of the omission to record, the votes of certain persons in favour of Wynne; as also evidence of the entry of votes for Somers instead of Wynne, and of the refusal of the defendant to interfere with the decision of Foley, his deputy, as to such votes, or to hear any argument upon the subject.

At the close of the plaintiff's case, the two following exceptions were taken on behalf of the defendant:—First exception.—Counsel for the defendant called upon the learned LORD CHIEF JUSTICE to nonsuit the plaintiff, or else to direct the jury to find a verdict for the defendant, on the ground that the evidence given on the part of the plaintiff did not sustain and prove the breach of duty in the summons and plaint alleged; and also on the ground that it was not the duty of the defendant, and that the defendant had not any jurisdiction or power, to decide that the plaintiff's vote was improperly rejected, as in the summons and plaint alleged, or to reckon, include and cast up the vote of the plaintiff amongst the number of the votes, after the final close of the poll, as in the summons and plaint charged. But the LORD CHIEF JUSTICE refused so to direct the jury; and therefore the Counsel for the defendant excepted to the said refusal and decision of the learned LORD CHIEF JUSTICE.

Second exception.—And Counsel for the defendant also, and at the same time, called upon the learned LORD CHIEF JUSTICE to withdraw from the consideration of the jury the evidence touching the rejection of the votes of certain persons named in the exception, and also the evidence touching the omission to record the vote, and also touching the refusal to reject the vote, and the act of

H. T. 1858.
*Queen's Bench*
SEDLEY
*v.*
M'GOWAN.

recording the votes of other persons, also respectively named in the exception; also the evidence touching the correction of the omission to record the vote, and also touching the entry of the votes of other persons, also respectively named in the exception, as if given in favour of Somers; said evidence, and every part thereof, being illegal, and impertinent to any of the issues in the cause. But the learned LORD CHIEF JUSTICE refused to withdraw said evidence, or any part thereof, from the consideration of the jury, and held and decided that same was proper for the consideration of the jury; to which ruling and decision the defendant excepts, and prays that his said exceptions shall be placed upon the record, for the examination of the Court above.

The jury found, upon all the issues, for the plaintiff, with £100 damages.

*Harkan* (with him *G. Fitzgibbon*), for the bill of exceptions.

The summons and plaint follows *Ashby* v. *White* (*a*), and contains but one count. Upon the true construction of the 13 & 14 *Vic.*, c. 68, the defendant, as Returning-officer, had no power to reject or admit votes, as to which a decision had been come to by his deputy. The duty of the Returning-officer previous to the 13 & 14 *Vic.*, c. 68, was regulated by the 35 *G.* 3, c. 29 *(Ir.)*, ss. 2, 3 & 5.

By the 1 *G.* 4, c. 11, s. 7, the Returning-officer was to have a separate booth erected, for the purpose of deciding upon all disputed questions and objections to votes. The 13 & 14 *Vic.*, c. 68, was passed to shorten the time and lessen the expense of elections in Ireland. By section 14, the Returning-officer is to appoint a deputy, and to deliver to him a list of the voters, which list is conclusive.—[CRAMPTON, J. I take it the deputies have no power at all; they are bound to receive the vote of every one whose name is upon the registry.]—By the 13 & 14 *Vic.*, c. 69, s. 89, no other oath than that provided by the Act can be administered; and by the Act only two questions can be put to any voter. First, "Are you "the same person whose name appears as A B on the register "of voters now in force for the borough of?" &c. Second, Have

(*a*) 1 Ld. Raym. 938; S. C., 1 Salk. 19; 3 Salk. 17; Holt, 524; 6 Mod. 45.

"you already voted here or elsewhere at this election for the borough of?" &c., which question being answered, the vote tendered must be received. Section 104 points out the remedy for the improper rejection of a vote, viz., by an investigation before a Select Committee of the House of Commons. It is illegal for the Returning-officer to enter into a scrutiny after the deputy has decided and entered an objection in the poll-book: *Pryce* v. *Belcher* (*a*). The rejection of the votes here was the act, not of the Returning-officer, but of his deputy, who alone is liable: *Barry* v. *Arnaud* (*b*). Then as to the second exception; the CHIEF JUSTICE refused to withdraw evidence which we contend was illegal, inasmuch as it was evidence of the acts of the defendant, from which it was sought to make him liable for the acts of his deputy. To prove malice, malice in law must be shown, and that is a question for the Judge, not for the jury.

*Macdonogh* and *Shekleton*, contra.

The 4 *G.* 4, c. 55, s. 37, prescribes the oath to be taken by the Returning-officer, and as to that it still remains unrepealed. That Act prescribes the duties of the Returning-officer, and the power which he has over his deputies: sections 34, 40, 42, 53 and 63; section 51 is repealed. Under the 13 & 14 *Vic.*, c. 69, there is no inquiry as to the right to vote; only two questions are allowed by the Act to be put to the voter: s. 89. Section 98 shows that the Act did not mean to place the election in the hands of any one whom the Returning-officer might choose to appoint as deputy. Then as to the second exception: malice in the Returning-officer is an essential element, and is for the consideration of the jury, and not of the Judge alone: *Cullen* v. *Morris* (*c*); and the Chief Justice's judgment, at p. 587. The evidence adduced was clearly admissible; it was most pertinent and relevant, to show how the defendant had acted. To prove guilty knowledge, and to show the *animus* of the party, evidence may be given of collateral circumstances, and is not limited to the precise act in question.

(*a*) 3 C. B. 58. (*b*) 10 Ad. & Ell. 646.
(*c*) 2 Stark. N. P. 577, 582.

H. T. 1858.
*Queen's Bench*
SEDLEY
*v.*
M'GOWAN.

Thus in an indictment for forgery, evidence is admissible to show that the prisoner had previously uttered the forged notes: *Rex* v. *Ball* (*a*); *Lambe's case*, cited in *Balcetti* v. *Serani* (*b*); so in an action by A, for the malicious prosecution by C, of an indictment against A and B, evidence of the misconduct of C towards B, after his apprehension, is admissible: *Caddy* v. *Barlow* (*c*). In *Ashby* v. *White* (*d*), the duties of the Returning-officer were very difficult to be administered; and that is adverted to by Powell, J., in his judgment: whereas now, their duties are much simplified, and in this case there are none of the difficulties which existed in that of *Ashby* v. *White*. Even if the plaintiff were a paid agent, he is nevertheless entitled to vote, the 7 & 8 *G.* 4, c. 37, by which he was disqualified, being repealed by the 17 & 18 *Vic.*, c. 102, schedule A.

*Fitzgibbon*, in reply.

I deny that the deputy acts under the control of the Returning-officer. Section 13 of the 1 *G.* 4, c. 11, which directed him to obey the instructions given him by the Returning-officer, or any other instructions, is no longer law, being repealed by the 4 *G.* 4, c. 55, s. 1, as to counties of towns, of which Sligo is one. Section 61 of the 4 *G.* 4, c. 55, requires that the Returning-officer shall give the deputy his instructions *in writing*, and that such deputy shall obey such instructions as shall be so given him by such Returning-officer, but it omits the concluding words of section 13 of the 1 *G.* 4, c. 11, "and any other instructions which may be given him," &c. The only instructions, therefore, the deputy is to obey, are those given to him in writing; and the moment he has received such instructions and is sworn, he ceases to be any longer under the control of the Returning-officer, and takes the poll according to his own judgment. Sections 1 and 61 of the 4 *G.* 4, c. 55, are still in force. The summons and plaint is bad on general demurrer. In *Ashby* v. *White* (*e*), which is relied on by the

(*a*) Russ. & Ry. 132; S. C., 1 Camp. 324.
(*b*) Peake, N. P. C., 192.
(*c*) 1 Man. & Ry. 275.
(*d*) *Ubi sup.*
(*e*) *Ubi sup.*

plaintiff, the plaintiff had no deputy. The three Judges who differed from Holt, C. J., held that the maxim "*de minimis non curat lex*" applied to the case, and that if the refusal to receive the plaintiff's vote were an injury, it was of so small and little consideration in the law that no action would lie for it. Then as to the second exception, it is the constant practice of the Judges at Nisi Prius to tell the jury that certain evidence, though received, ought not to be attended to by them.

*Cur. ad. vult.*

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CRAMPTON, J.

*Jan.* 28.

This case was tried before my LORD CHIEF JUSTICE, at Nisi Prius, in this Court, when a verdict was had for the plaintiff, subject to a bill of exceptions taken at the trial by the defendant's Counsel. The exceptions were argued in the absence of the CHIEF JUSTICE, and it now devolves upon me to pronounce the judgment of the Court.

The action was brought by the plaintiff, a voter in the borough of Sligo, against the defendant, who is the Mayor and Returning-officer for that borough.

The charge in the plaint is, that the defendant, as Returning-officer, *maliciously* and *fraudulently* rejected the plaintiff's vote at a late election of a Member of Parliament to represent the borough of Sligo.

So many as six defences were pleaded by the defendant. These defences traverse the main facts alleged in the plaint; and *one* of them avers that the rejection of the plaintiff's vote was the act of one of the defendant's deputies, over whom the defendant had not jurisdiction, and was not the act of the defendant himself. Several issues were knit upon this pleading, of which I need notice but these two; viz., whether the defendant acted fraudulently and maliciously? and whether the defendant rejected the plaintiff's vote, as alleged by the plaint?

All the issues were found in favour of the plaintiff, and £100 damages were given by the jury.

The exceptions are two in number, and are indeed of a novel

H. T. 1858.
*Queen's Bench*
SEDLEY
v.
M'GOWAN.

kind.—[His Lordship here read the exceptions.]—Now to make these exceptions intelligible, I should state that, in point of fact, the plaintiff's vote was rejected by the deputy; and the defendant, being appealed to while the poll was going on, refused to redress the injury and to admit the plaintiff's vote. I should add that the defendant, who so called upon the CHIEF JUSTICE to direct the jury, appears afterwards to have gone himself into evidence; and I will assume that the call so made at the close of the plaintiff's case was renewed at the the close of the defendant's own case, although it is not so alleged. I should also state that the record is entirely silent as to the charge of the learned Judge, and does not state that any objection was offered by the defendant's Counsel to any part of the evidence produced on the plaintiff's part.

As to the first exception; it consists of two parts—a call for a nonsuit, and a call for a direction. Now it is well settled that a refusal to nonsuit is not the ground of an exception; the exception must go to a single point: see *Bull. N. P.*, p. 316. The plaintiff may refuse to be nonsuited; the first part of the exception therefore cannot be sustained.

But secondly, was the Judge bound to direct the jury in the terms required by the defendant's Counsel? I think not. In my apprehension, an exception lies to any rule made by the Judge at the trial, or to what a Judge says in his charge, or any part of it; but not to what he does not say, or refuses to say. A Judge is not by law compelled to charge at all—though in many (indeed in most) cases, it would be right and expedient so to do. The exception should be for *mis*-direction, not for *non*-direction. What the charge of the CHIEF JUSTICE was upon the occasion, or whether he charged at all, beyond summing up the evidence and leaving the case to the jury, does not appear upon the record. Upon this ground merely, therefore, the first exception in this case should be overruled.

However, the learned Counsel for the defendant asserted that, in point of fact, the CHIEF JUSTICE did charge the jury; and in that charge told them that, in his opinion, the Returning-officer might, in this case, be made answerable for the official act of his deputy in re-

jecting the plaintiff's vote. I must observe, that one of the findings of the jury was, that the defendant acted fraudulently and maliciously in the rejection of the plaintiff's vote; and there is abundant evidence on the face of the record to support that finding. Now, though this question of jurisdiction in the Returning-officer does not properly come before us, yet, as it is one of great practical importance, and as Mr. *Fitzgibbon* (who argued the defendant's case with his accustomed ability) relied solely upon this ground, I think it not unreasonable to observe upon it.

I entirely concur in the opinion stated to be that of the CHIEF JUSTICE; I conceive that the statute directing the Returning-officer to appoint *deputies* to take the poll at each separate polling-place does not deprive the Sheriff or Returning-officer of his controlling power over his deputies while the poll is going on, or strip him of all responsibility as to their acts. They are, no doubt, sworn officers, and have prescribed duties to discharge; but they still remain under the surveillance of their principal: he may discharge them for misconduct, or otherwise at his pleasure, without a moment's motice. It was argued that, because the statute requires the Sheriff or Returning-officer to give, before the poll begins, instructions in writing to his deputies for their general conduct during the poll, he is, therefore, precluded from giving, *pro re nata*, verbal instructions also. I apprehend this is a mistaken inference. The Returning-officer sits, in general, in a separate booth, not for the purposes of a scrutiny (that is taken from him by the statute), but for deciding all matters arising while the poll is being carried on, and of hearing complaints against his deputies. It is true also, as argued, that, at the close of each day's poll, the poll-books are delivered, sealed by the *poll-clerk*, to the Sheriff; and he can *then* make no change in them, or even open them, until the day for declaring the Member has arrived. But, I apprehend, his duty of controlling and regulating the conduct of his deputies continues all the time that the poll is going on. Miserable legislation indeed would it be, if the statute left it in the power of the Returning-officer to appoint insufficient, partial, and, mayhap, pauper deputies, leaving to parties aggrieved by their injurious acts and misconduct

H. T. 1858.
*Queen's Bench.*
SEDLEY
*v.*
M'GOWAN.

no remedy by action against the principal, the chief aggressor. What is a *deputy?* Let us hear what the Common Law says:—"A deputy is he that occupieth in another man's right, whether it "be office or any other thing else; and his forfeiture or misdemean-"our shall cause the officer, or him whose deputy he is, to lose his "office:" *Les Termes de la Ley*, tit. *Deputie*. And again:—"But "a deputy hath not any estate or interest in the office, but is only "the shadow of the officer, and doth all things in the name of the "officer himself, and nothing in his own name, *and for which his* "*grantor shall answer:*" *Ibid.* What is done by the deputy is done by the principal, who may displace him at his pleasure: *per* Holt, C. J., 1 *Salk.*, pp. 18, 19, cited *Vin. Abr.*, tit. *Officer* (K 3), *Deputy* 5. There are other authorities to the same effect. All this seems implied in the very term *deputy;* and the statute, using that term, does not alter the Common Law.

The case of the Returning-officer's deputy at an election is analogous to that of a Deputy Sheriff for a county. He, too, is a sworn officer—he exercises all the ordinary powers of the Sheriff; and for his official acts the High Sheriff is responsible.

As to the second exception, a few words will be sufficient to dispose of it. The Judge is called upon to withdraw from the consideration of the jury, when considering their verdict, certain portions of the sworn evidence laid by the parties before them. Under any circumstances, this would be a difficult and delicate duty to impose upon the Judge; but to make such a call, in a case in which the evidence sought to be withdrawn was not excepted or even objected to, would be quite monstrous. On this record, the evidence now complained of was received without any objection on the defendant's part.

We have, therefore, no difficulty in overruling both the exceptions in this case. I might say, in addition, with reference to the first exception, that, if the defendant's Counsel be right in their views of the doctrine there asserted, their objection appears on the record, and might be made the subject of error, or arrest of judgment.

The judgment on this record must be for the plaintiff.

PERRIN, J.

I concur in the judgment of my Brother CRAMPTON; but I think it necessary to say a few words as to the form of the exceptions.—[His Lordship here read the first exception.]—Now, I think, without pressing objections to form too far, that is clearly an exception which excepts to nothing.—[His Lordship then read the second exception.]—This is the first time I ever read such an exception as this. Here, after a great number of witnesses have been examined, and all the evidence is given, then, the learned CHIEF JUSTICE is called upon, after the party has had an opportunity of hearing the evidence, and can form an opinion of its effect upon the jury, to withdraw from the consideration of the jury all the evidence thus huddled together, and to say what will touch this, and what will touch that, and to withdraw this or that portion of the evidence, and to tell the jury not to attend to it; but the learned Judge refuses to do so, and thereupon the defendant excepts, and prays that his exceptions may be put upon the record. There is the whole exception. Then, the defendant goes on to examine nearly as many witnesses as the plaintiff, and, at the conclusion of that, the CHIEF JUSTICE summed up the evidence and charged the jury, and left the consideration of the case, upon the evidence aforesaid, to the jury, who thereupon found a verdict for the plaintiff, with damages for £100. These are the exceptions to which the attention of the Court is called. My first impression was, that this was not a bill of exceptions at all—however, my Brother CRAMPTON has considered it so; and I concur with him in the opinion that the exceptions should be overruled. The first exception is a demurrer to the evidence, and the second exception is an objection to the evidence after it had been before the jury, and the whole effect of it might have been produced upon their minds. It would be dangerous to the course of justice to allow such exceptions.

Exceptions overruled.

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NOTE.—The doctrine propounded by CRAMPTON, J., *supra*, that "the exception should be for mis-direction, not for non-direction," is stated in precisely similar terms by Parke, B., in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 499; S. C., 17 Jur., 995, 997 (H. L.). In *M'Mahon* v. *Leonard*, 4 Ir. Com. Law

H. T. 1858.
*Queen's Bench*
SEDLEY
*v.*
M'GOWAN.

Rep., p. 16, at p. 31, Monahan, C. J., says:—"The only proper subject-matter of an exception is to the ruling of the Judge, and not to the reasons which he may have given for such ruling." So also Ball, J., in the same case on appeal, in the Exchequer Chamber, 5 Ir. Com. Law Rep., 209, at p. 253:—"As a general proposition, I apprehend it is not the law that every opinion expressed by a Judge, at Nisi Prius, upon matters of law, may be made the subject of exception; if the opinion so announced amounts in substance, as it generally does, to a ruling or direction upon a point of law pertinent to the issue, it is plain that an exception lies to it, if it be erroneous; but if a Judge, on being called on to direct a jury, refuses to do so, and is warranted in point of law in so refusing, but accompanies his decision with an erroneous reason for what he does, an exception does not lie, in my judgment, to such ill-founded reason of the Judge, apart from his decision, which was correct. I take the principle to be that, an erroneous opinion, expressed gratuitously by a Judge upon a matter of law not required to be decided by him, is not the proper subject of exception." So also Jervis, C. J., in *Jeffreys* v. *Boosey*, 4 H. L. Cas., pp. 815, 941; S. C., 1 Jur., N. S., pp. 615, 639:—"The party who excepts to the ruling of a learned Judge must show clearly upon his bill that the learned Judge was wrong. Every fair intendment must be made in favour of the summing up; and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand." Again, it is stated by Jervis, C. J., delivering the judgment of the Court of Exchequer Chamber, in *Gregory* v. *Cotterell*, 2 Jur., N. S., pp. 16, 20:—"The exception must not take an objection to the Judge not doing what he ought to have done, but must object to some positive act which he did." The bill of exceptions must be tendered before the verdict is delivered: Bramwell, B., in *Wade* v. *Tatton*, 2 Jur., N. S., pp. 491, 492 (Ex. Cham.)

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## THE QUEEN, at the Prosecution of JAMES LALOR,

*v.*

## THE JUSTICES OF THE PEACE OF THE QUEEN'S CO.*

*Jan.* 14, 28, 29, 30.

Upon the hearing at Petty Sessions of a summons against P., for assault, L., who had been summoned as a witness, attended, but the presiding Magistrates, being of opinion that L. was also a party to the assault, erased L.'s name from the column for the names of witnesses in the Petty Sessions book, and inserted it in that for the names of defendants; they then received evidence against L., and convicted, and sentenced him to three weeks' imprisonment.—*Held*, that the Magistrates acted without jurisdiction, there having been no previous complaint against L., and a *certiorari* was therefore granted to remove the conviction and proceedings into this Court.

D. C. HERON, on the 23rd of November 1857,† had obtained a conditional order for a writ of *certiorari*, directed to the Justices

* CRAMPTON and PERRIN, JJ. † MOORE, J., *solus*.

of the Peace of the Queen's County, and to the Clerk of the Petty Sessions district of Abbeyleix in the same county, to remove into this Court a conviction by L. H. Bland, P. Whelan and T. Doxey, three of the said Justices, at the Petty Sessions held at Abbeyleix aforesaid on the 15th of August 1857, for the committal to prison of J. Lalor for a period of three weeks, with all the documents connected therewith, in order that the same might be quashed, upon the grounds that the conviction was illegal, inasmuch as the Justices had not jurisdiction to commit J. Lalor, no summons or other document having issued upon which to ground the conviction, and inasmuch as no offence was proved against J. Lalor, who was not in fact guilty of any offence to warrant the conviction or imprisonment, and inasmuch as the conviction was had without complaint by W. Case or R. Carter, the persons named as complainants in said proceedings by said Justices, and against the will and contrary to the direction of the said W. Case and R. Carter.

It appeared by the affidavit of J. Lalor, that, on the 21st of July 1857, he was in the company of E. Phelan, near the town of Abbeyleix, when an assault was committed by W. Case upon E. Phelan, as alleged by E. Phelan. That W. Case summoned E. Phelan to the Petty Sessions at Abbeyleix, on the 1st of August 1857, for an assault; but, upon the case coming on to be heard, stated that he had settled the complaint, by accepting one shilling costs. That the police caused new summonses to be issued, and that, on the 8th of August 1857, the said J. Lalor was served by a policeman with the following summons:—

"1851. 14 & 15 *Vic.*, c. 93.
Wm. Case and Richard Carter, Complainants;
Edward Phelan, Defendant.

Petty Sessions District of Abbeyleix, Queen's County.

Whereas a complaint has been made to me that you can give evidence in favour of the complainants, this is to command you to appear as a witness on the hearing of said complaint at Abbeyleix, on Saturday the 15th of August 1857, at twelve o'clock noon, before such Justices as shall be there.

(Signed) THOMAS DOXEY, Justice of said county.

To J. Lalor of Ballyeagle. 8th of August 1857."

That, in obedience to the said summons, the said J. Lalor

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
JUSTICES OF QUEEN'S CO.

attended at the Petty Sessions on the 15th of August, but did not go into the Court until his name was called. That the defendants were the presiding Magistrates, L. H. Bland being chairman. That when the clerk was about to administer the oath to the said J. Lalor, the head constable of the town addressed some observations to the Magistrates, but in so low a tone that the said J. Lalor did not hear the same; whereupon the Magistrates held a private conversation, and asked J. Lalor whether he had heard what W. Case had sworn, to which he replied that he had not; that thereupon the Magistrates asked W. Case what J. Lalor had done to him on the 21st of July; to which Case replied to the effect that J. Lalor had not done anything to him; that thereupon, as J. Lalor believed, L. H. Bland erased the name of the said J. Lalor from the column of the Petty Sessions book, where it had been entered as a witness, and placed it in the column for defendants, and then sentenced the said J. Lalor to be imprisoned for three weeks, and E. Phelan for six weeks; and that the said J. Lalor was accordingly confined in the county gaol until the 5th of September. By the affidavit of L. H. Bland, it appeared that, when the case of W. Case and R. Carter, complainants, against E. Phelan, defendant, was called on, W. Case stated that he had settled with the defendant; but the Magistrates required the case to be gone into, and a summons to appear as witnesses having been served on both W. Case and R. Carter, upon their examination, as it appeared to the Magistrates, an assault was proved to have been committed on them by E. Phelan, assisted by J. Lalor. That the case having been proved against E. Phelan, as appeared to the Magistrates, he was then called upon for his defence, when he stated that he had a witness, and offered to produce J. Lalor, whose name was accordingly entered by L. H. Bland (acting as chairman), as a witness, in the Petty Sessions book; but upon it having been intimated that the J. Lalor then produced as a witness was the same J. Lalor who, as it appeared on oath before the Magistrates, was the party connected with the assault in the said case, the Magistrates refused to swear and examine J. Lalor as a witness; and the said L. H. Bland, with the approbation of his brother Magistrates, struck

J. Lalor's name out of the column for witnesses in the Petty Sessions book, and inserted it in that for defendants, of which the said J. Lalor was informed, and that he was about to be tried for the offence of an assault against the said W. Case, to which the said J. Lalor did not object, or raise any question, or ask for any further time; whereupon W. Case and R. Carter were re-sworn in the presence of said J. Lalor, and, being so sworn, proved, as it appeared to the Magistrates, an assault by the said E. Phelan and J. Lalor upon the said W. Case: whereupon the said L. H. Bland, as chairman, sentenced the said J. Lalor to three weeks' imprisonment.

*J. T. Ball* (with him *J. E. Walsh*) now showed cause.

The jurisdiction of the Magistrates does not depend upon the fact of a summons having issued; the object of a summons is to compel the person who is summoned to attend before the Court; but if the person is already present, and does not object to the case being proceeded with, upon the ground of want of time to prepare his defence, the fact of a summons not having issued is not material: *Regina* v. *Beresford* (*a*). The case of *Rex* v. *Stone* (*b*) was a conviction under the English Game Acts, which are more stringent in their terms than the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 *Vic.*, c. 92), ss. 1 and 2. By this latter Act, the jurisdiction arises immediately upon the offence being proved, and the issuing of a summons is not a condition precedent. Whether an offence was committed was a question solely for the Magistrates, and they decided that there was was an offence. As to W. Case not wishing to prosecute: in civil causes a party may compromise his own damages, but in criminal cases the rule is otherwise.

*Macdonogh* (with him *D. C. Heron*), contra.

In *Regina* v. *Beresford*, the *certiorari* was granted because this Court was satisfied that the Magistrates had exceeded their jurisdiction, although in that case the defendant was before them on

(*a*) Lev. Just. Man. 200.

(*b*) 1 East, 639.

H. T. 1858.
*Queen's Bench*
LALOR
*v.*
JUSTICES OF QUEEN'S CO.

a warrant. In the present case, no complaint was made against the prosecutor; and the jurisdiction of the Magistrates, under the Summary Jurisdiction Act, only arises upon the complaint being brought before them.—[He was then stopped by the Court.]

*J. E. Walsh*, in reply.

The right to a *certiorari* being taken away by statute 14 & 15 *Vic.*, c. 92, s. 24, this Court cannot enter into the question whether the evidence was sufficient to warrant the conviction: *Ex parte Hopwood* (*a*). This Court cannot interfere, unless it be satisfied that the Magistrates acted without jurisdiction: *Regina* v. *Bolton* (*b*). Unless a summons is required by statute, it is not essential in a case where the defendant is before the Court already, and does not ask for further time to prepare himself: *Regina* v. *Barret* (*c*); *Rex* v. *Aikin* (*d*); *Rex* v. *Stone* (*e*); 1 *Wms. Saund.*, p. 262, *b*, *c*. Informations are not necessary unless required by statute: *Regina* v. *Millard* (*f*). If the Magistrates have been guilty of misconduct, the proper mode of proceeding is by criminal information against them, not by *certiorari*.

CRAMPTON, J.

Important questions have been raised in this case, and a great deal of law has been laid down, abstracted from adjudged cases, by the Counsel showing cause, with which we do not quarrel. I agree with Mr. *Ball* and Mr. *Walsh*, that the question is simply one of jurisdiction, whether the Magistrates had jurisdiction under the circumstances of the case, and whether they properly exercised that jurisdiction? No doubt, there is abundant authority to show that a person may be proceeded against, if he appear to answer a complaint preferred against him, although he was not summoned: on such an appearance the Magistrates have jurisdiction to proceed, and the

(*a*) 4 New Sess. Cas. 174; S. C., 15 Q. B. 121; S. C., 14 Jur. 812.
(*b*) 1 Q. B. 66.
(*c*) 1 Salk. 383.
(*d*) 3 Burr. 1785.
(*e*) 1 East, 639.
(*f*) 1 D. C. C. 166; S. C., 6 Cox C. C. 150; S. C., Lev. Jus. Man. 141.

doctrine is the same with regard to informations, although, generally, both summons and informations are required. Therefore we are not now deciding that, in all cases under the Petty Sessions Act, the Magistrates are stripped of jurisdiction by the circumstance that *no* summons has issued. If a party appears in Court in answer to a complaint, although no information has been made against him, he renders himself liable to the jurisdiction of the Court; and therefore, if we refuse to admit the cause shown, it is not upon the ground of there being no summons nor information in the case. No; the ground is, that the Magistrates proceeded without jurisdiction in this case, there having been no previous complaint against this party. A part of the case now before us is the summons of the Magistrates, commanding the defendant to appear and give evidence, as a witness for the prosecution, against Phelan, the party complained of. But first, I would observe, in answer to some remarks made with regard to the case of *Ex parte Hopwood* (*a*), that I quite agree in the doctrine that this Court has no right whatsoever to investigate the grounds, in point of fact, upon which the Magistrates decide a case in Petty Sessions; but that case was properly called a startling one by the Counsel for the Magistrates, because it would appear from the report of it that no evidence whatever was given against the defendant; but the Court of Queen's Bench in England seems to have been of opinion, in that case, that the conduct of the Justices, in convicting a man without any evidence, was more properly examinable by information against the Magistrates, than as a question of jurisdiction, because, whether the evidence was much or little, that is not a matter for the interference of the Court of Queen's Bench. The case is certainly one of a startling nature; for admitting that the more or less of evidence is not for the Queen's Bench to act upon, yet it does seem strange that the Justices shall have jurisdiction to proceed to convict a man without any evidence at all given or offered; but, assuming that case to be law, it does not rule the case before us. The main question before us is, whether, under the Petty Sessions Act, the Justices have jurisdiction to proceed summarily to convict a man, without

(*a*) *Supra.*

H. T. 1858.
*Queen's Bench*
LALOR
*v.*
JUSTICES OF QUEEN'S CO.

a complaint previously made against him, without summons or information? I see no evidence of corruption on the part of the Justices; they seem to have acted *bona fide*, and with good intentions; they were satisfied that something existed in the county, which required an example to be made of an assault such as this, and they therefore took the opportunity of making a wholesome example in the case then before them. But let me observe that short cuts towards the attainment of justice generally compromise that very justice which it is intended to attain. The true course for Magistrates is, to pursue the exact course prescribed by the statutes under which they sit, and by the Common Law, and not to deviate from that course upon the grounds of public policy, or any other grounds whatsoever. I proceed to examine the facts upon which the Court is disposed to affirm the conditional order for the *certiorari*. I take it for granted that an assault was committed, although I own if I were sitting as a juror (perhaps I have no right to say this), I should find it difficult to spell out an assault in this case. I see no evidence of anything beyond intimidation. We are not, however, trying the case of assault at present; but, assuming that an assault was committed, what was the course of proceeding? A complaint is made against Phelan; Lalor happened to be in his company when this assault took place; a complaint for the assault is made against Phelan only, none whatsoever against Lalor. The complaint is brought before the Magistrates, and they have clear jurisdiction to try the charge against Phelan; Lalor, against whom no complaint had been made, is subpœnaed as a witness for the prosecution, and for that purpose only. It was his bounden duty to attend, in obedience to the subpœna of the Magistrates. He does so; and we are called upon to say that, this attendance of his, in discharge of his duty, is to be taken as a substitution for information, summons, and complaint. The trial of Phelan's case proceeds before the Magistrates. I do not quarrel with anything done with respect to Phelan; in his case, he is regularly summoned, and there is a regular complaint against him; witnesses are produced against him, and he is convicted. Lalor's name had been inserted in the Court-book as a witness. Upon somewhat appearing to affect Lalor,

in the evidence of a witness, Lalor's name is, by the presiding Magistrate, struck out of the Court-book as a witness, and is inserted as a party "complained against," along with Phelan. He is thus suddenly turned from a witness into a culprit, and convicted at once as a party aiding Phelan in the assault. It is argued that, not having made an application for time, he is to be deemed as consenting to be then tried: that, not having made a formal application for a postponement, although taken by surprise, and *inops consilii*, he is to be deprived of the privilege which the law of England gives to a party charged with crime, and without previous complaint or notice—without time to procure Counsel, agent or witness, he is at once to be put upon his trial. Now it appears clear to me that the statute requires a previous charge or complaint, to give jurisdiction to the Justices to proceed. But it is said that the presence of Lalor in Court, and the declaration of the Magistrate that he was put upon trial, amounted to a previous notice. I cannot accede to that argument. The statute requires a previous notice—a reasonable notice, according to the practice of the Court, so as to allow time to a party accused to prepare and provide for his defence; but it is a mockery to call the transaction, by which Lalor's condition was suddenly changed from that of a witness into that of a culprit, a previous notice, within the meaning of the statute. Here is neither prosecutor, complaint, information, or summons; but advantage is taken of Lalor's attendance as a witness in discharge of his duty, to hurry him into a sudden trial and conviction. Suppose he had not been in Court, and the Justices had sent a constable and arrested him, and then put him at once upon his trial, their jurisdiction would have been as well founded as in the present case.

Therefore, we are of opinion that the cause shown in this case should be disallowed. The Magistrates, we think, have acted mistakenly, and not corruptly. We shall give the party his costs, if he undertakes to bring no action; but if that undertaking be not given, we shall give no costs.

PERRIN, J.

In addition to what has fallen from my Brother CRAMPTON, I

H. T. 1858.
*Queen's Bench*
LALOR
*v.*
JUSTICES OF QUEEN'S CO.

have some curiosity to see how far the law can be carried. If neither complaint, summons or information be necessary for a conviction, what is necessary?

Cause disallowed.

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*Jan.* 28, 29.

The return having been made to the *certiorari*—

*Macdonogh* (with him *D. C. Heron*) moved to quash the conviction by the Magistrates; he cited *Regina* v. *Deny* (*a*).

*J. T. Ball* and *J. E. Walsh*, contra, cited, in addition to the cases relied upon on the former argument, *Regina* v. *Wood* (*b*) and *Rex* v. *Casson* (*c*).

*Cur. ad. vult.*

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LEFROY, C. J.

*Jan.* 30.

The Court is of opinion that they ought not to quash the conviction.*

(*a*) 20 Law Jour., M. C., 189; S. C., 2 Low. M. & P. 230.
(*b*) 5 El. & B. 49. (*c*) 3 D. & R. 36.

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## CLARKE *v.* HINDS.*

*Jan.* 22.

A *scire facias*, tested on the 4th of December 1857, and directed to A and B, after setting out a judgment recovered against C, stated that, previously to the recovery of the judgment, A and B personally came into open Court, before a Judge at Nisi Prius, and entered into a joint and several recognizance, conditioned for payment of the debt and costs, to be recovered against C, and averred that the judgment and recognizance were "in full force and effect."—*Held*, upon demurrer, that the absence of an express averment in the *scire facias*, that the recognizance was enrolled of record, was, at most, only matter of special demurrer: and, that the *scire facias* was within the meaning of the Common Law Procedure Act 1853, s. 153, and was therefore properly directed to A and B, and not to the Sheriff, and correctly tested in Vacation.

SCIRE FACIAS upon a recognizance. The *scire facias* was direct to George F. R. Mowlds and Charles Moreton, and stated a judgment recovered by Michael Clarke against John Hinds, on the

* *Coram* LEFROY, C. J., CRAMPTON and PERRIN, JJ.

of July 1857, for the sum of £85. 4s. 8d., upon which execution yet remained to be made to the plaintiff; and that George F. R. Mowlds and Charles Moreton, previously to the recovery of the said judgment, personally came into open Court, before LEFROY, C. J., at Nisi Prius, in the Court of Queen's Bench, on the 17th of June 1857, and jointly and severally acknowledged themselves indebted to the plaintiff Michael Clarke, in the sum of £100, to be levied, &c.; upon condition that, if the said John Hinds should pay to the plaintiff all such debt and costs as should be recovered against the said John Hinds, the said obligation should be void. The *scire facias* then averred that the said judgment and recognizance were in full force and effect.

To this *scire facias*, George F. R. Mowlds and Charles Moreton separately demurred, in similar terms, upon the following grounds:—That it is not averred that the said George F. R. Mowlds became bound for the payment of said debt and costs by any recognizance of record. That the said writ does not appear to be founded or issued upon or in respect of any matter of record, and does not aver or show that said recognizance in said writ was or is a record or was enrolled in the said Court, or any other Court. That the said writ is directed to the said G. F. R. Mowlds and C. Moreton, and not to the Sheriff of Dublin, or of any other county, city or bailiwick, and does not, according to precedent, require any Sheriff to make known to the said G. F. R. Mowlds and C. Moreton, &c. That the said writ is not tested on any day in Term, and is not tested and returnable according to law and precedent.

*D. Lynch* and *C. Barry*, in support of the demurrer.

*Macdonogh* and *Concanon*, contra.

*Concanon* (*C. Barry* being absent) was directed by the Court to begin.—The grounds of demurrer are substantially two: first, that the recognizance is not of record; and secondly, that the *scire facias* is directed to the parties themselves, and not to the Sheriff. As to the first ground of demurrer; by established precedent, if a recogni-

H. T. 1858.
*Queen's Bench*
CLARKE
*v.*
HINDS.

zance be taken in open Court, it is of record: *Farmer* v. *Ryves* (a); *Lilly's Entries*, p. 406; *Ferg. Forms*, p. 582, form 6. I admit that, if the recognizance be taken before a Commissioner of the Court, it is necessary to aver in the *scire facias* that the recognizance is enrolled of record: *Ferg. Forms*, p. 583, form 7; *Laverty* v. *Duffin* (b); but the absence of such an averment was merely ground of special demurrer: *Fisher* v. *Whaler* (c); *Powdick* v. *Lyon* (d); and special demurrer being abolished, this is no longer a ground of demurrer. At all events, the *scire facias* contains an averment that the recognizance "is in full force and virtue," which is the only necessary averment: *Chitty's Forms*, 7th ed., p. 422. As to the second ground of demurrer:—The Common Law Procedure Act 1853, s. 153, has altered the former practice: it directs that all writs of *scire facias* against bail on a recognizance, and in other cases mentioned in that section, "shall be "dated, directed and proceeded upon in like manner as writs of "revivor;" and the form of a writ of revivor given by the statute, sch. B, No. 11, is directed to the party himself. Under the former law, the averment *prout patet per recordum* would have been also necessary; but the statutory form of the writ omits that averment. In *Ferg. Com. Law Procedure Acts*, 2nd. ed., p. 194, the present practice is thus stated:—"In the cases enumerated in "the 153rd section, the writ of *scire facias* may be tested in "Term or Vacation, and be directed to the parties in person." Next, it may be argued that the recognizance in this case is not within the class contemplated by the Common Law Procedure Act 1853, s. 153, inasmuch as it differs from an ordinary recognizance, because the condition is merely to pay the debt and costs, omitting all mention of the body of the debtor; but it must be conceded that bail in error is within that section, and the condition of the recognizance of bail in error is always to pay the debt, it is not to give up the body: *Chitty's Forms*, 7th ed., pp. 260, 286.—[LEFROY, C. J. The case of bail in error is clearly within that section.]—The sureties in bail in error are, in the language of the

(a) Lilly's Entries, 394, 395.
(b) Al. & Nap. 295.
(c) 4 Ir. Jur. 29.
(d) 11 East, 565.

old authorities, manucaptors; but "manucaption is not to render the body, but to pay the debt:" *Austen* v. *Monk* (*a*). This recognizance, being taken in open Court, is of record; it is averred to be in full force and virtue, and it is therefore bail on a recognizance, within the meaning of the Common Law Procedure Act 1853, s. 153.

*D. Lynch*, in support of the demurrer.

It is argued that, because a recognizance is taken in open Court, it is a matter of record; but it is not of record until it is enrolled upon the records of the Court. According to Lord *Coke's* definition (*b*), a record must be a memorial entered upon the parchment rolls of the Court. This definition is adopted in the judgment of Lord Ellenborough, C. J., in *Glynn* v. *Thorpe* (*c*). "An obligation "by matter of record is a writing obligatory acknowledged before "a Judge, and enrolled in a Court of Record; and of this there are "two sorts, viz., recognizances or statutes:" *Bac. Ab.*, tit. *Execution*, B 1. Therefore, this *scire facias* is defective, because it does not show upon the face of it that it is a matter of record.—[LEFROY, C. J. Does a *scire facias* carry with it a presumption that it issues upon matter of record?]—No; it is only the act of the officer of the Court, and brings no verity with it. This objection is not matter of special demurrer, because the ground taken in the present case differs from the cases cited upon the other side, and the *scire facias* being wrong in a material allegation, the objection is rightly taken by demurrer. The precedents given in *Chitty's Forms*, 7th ed., p. 286, contain the averment which we say is wanting here. Next, this recognizance is not within the Common Law Procedure Act, s. 153; the condition provides merely for the payment of the debt and costs; but bail means to have the person in Court to answer the complaint, and not merely to be answerable for a debt in a certain event. The 153rd section of the Act enumerates certain specified cases; it does not comprise all writs of *scire facias*, and the Court therefore will examine the words of the section, which

(*a*) Cro. Jac. 402. (*b*) 1 Co. Litt. 260 *a*.
(*c*) 1 B. & Al. 153, 156.

H. T. 1858.
*Queen's Bench*
CLARKE
*v.*
HINDS.

cannot admit of the wide meaning of "bail on a recognizance," which is contended for on the other side, viz., that if a person comes into Court, and undertakes to be liable for a debt, in a given event, that that is bail. It cannot be argued that sureties are "bail" for any person, if they have not a duty cast upon them to render up the person. The present case therefore is not such a "bail on a recognizance" as is contemplated by the 153rd section of the Act, and the Court cannot strain the words of that section to meet this case.

*Macdonogh* replied.

LEFROY, C. J.

We think that there is quite answer enough given to the objections raised by this demurrer. Perhaps, we might go so far as to say, if necessary, that the recognizance, being taken in open Court, might be called a judgment of the Court, and that we must consider that everything which ought to have been done was done, unless the contrary appear, and therefore that it was enrolled; but, as has been well argued by Counsel, this would be at most only a matter of special demurrer. Then, as to the other ground of demurrer, namely, that the *scire facias* is directed to the party himself, and not to the Sheriff; I think that we act the most safe and prudent course in giving to the 153rd section of the statute a wide construction, and thus do justice to the Act of Parliament—safe and substantial justice—in directing the writ to the party himself, instead of exposing him to additional risk, by directing it to the Sheriff. We think therefore that the 153rd section of the Act should be construed liberally and widely, and that it is wide enough to comprehend the recognizance in this case, and to justify the directing the *scire facias* to the party himself, instead of sending it to the Sheriff. We overrule both the demurrers, and give all the costs which the plaintiff has been put to.

Demurrer overruled.

## CARSE *v.* TAYLOR.*

*Feb.* 1.

A, as administrator with the will annexed of B (who was alleged to be dead, but who subsequently proved to be living), sued out a writ of revivor upon a judgment recovered by B against C, whereupon C entered an appearance to the writ, and paid to A the sum claimed to be due upon the judgment. A also executed a satisfaction piece to C, by virtue of which, satisfaction of the judgment was entered on the record. In an action by C against A, to recover back the money so paid, the plaint averred that the same was paid by C, "confiding in and giving credit to the representations of A, that B was dead, and that A was her legal administrator."—. *Held*, upon demurrer, that C, having paid the money under a mistake of facts and upon misrepresentation, was entitled to maintain the action.

THE summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £60.

The plaintiff averred, in the first count, that John Smith Taylor the defendant, on the 16th of January 1855, as administrator with the will annexed of Mary Scott deceased, sued out a writ of revivor in the Court of Queen's Bench against the plaintiff, as survivor of Robert M'Gibbon deceased, of a judgment recovered by the said Mary Scott, on the 5th of February 1844, against the said Robert M'Gibbon and the plaintiff, whereon the defendant alleged that the sum of £52 was due and unsatisfied: and that the plaintiff entered an appearance to the said writ, and, in order to prevent execution being issued against him upon foot of said judgment, the plaintiff was obliged to pay, and did pay, to the defendant, as such alleged administrator, the sum of £43. 19s. 6d., for debt, together with £6. 7s. 9d. for costs: and that the defendant, as such alleged administrator, thereupon executed to the plaintiff a satisfaction piece, by virtue of which the plaintiff had said judgment satisfied upon the record on the 2nd of March 1855: and that the plaintiff was, in consequence of such proceedings being so taken against him by the defendant, obliged to pay to his own attorney the sum of £7. 12s. 9d., for the costs of appearing to the said writ of revivor, and satisfying the said judgment.

And the plaintiff further averred, *that he made such payments to the said John Smith Taylor, confiding in, and giving credit to, the allegations and representations of the said John Smith Taylor, that the said Mary Scott was dead, and that the said John Smith Taylor was her legal administrator; whereas, in truth and in fact, the said Mary Scott was then and still is alive, and the said John*

* LEFROY, C. J., and PERRIN, J., *absentibus*.

H. T. 1858.
*Queen's Bench*
CARSE
*v.*
TAYLOR.

*Smith Taylor was not her legal administrator*, nor authorised to receive the amount of the said judgment debt, nor to execute said warrant to satisfy the same; and the satisfaction thereof upon record is a nullity, and said judgment still remains in full force and virtue in law, and the plaintiff still remains legally liable to the said Mary Scott for payment of the amount of the said judgment, with interest thereon from the date of such payment, to the said John Smith Taylor, as her said pretended administrator.

The plaint also contained counts for money had and received, and for interest.

Demurrer to the first count of the summons and plaint: because, it appears thereby, that the plaintiff paid the said sums therein mentioned, after and in consequence of the said defendant suing out a legal process, viz., a writ of revivor, against the said plaintiff, and also after the said plaintiff had appeared and taken defence thereto; and because it is not averred that the said defendant, at the time of issuing said writ, or of the payment of said moneys, knew that said Mary Scott was alive, or did not then believe that she was dead, or did not then believe that he was her *bona fide* and rightful administrator, and as such entitled to sue for, and recover, and receive, the said sums of money. And because it is not averred that the defendant used any fraud or extortion in suing out, or that he fraudulently issued, said writ of revivor against the plaintiff. And because it is not averred that, at the times of said appearance and defence to said writ of revivor, or of paying said moneys, plaintiff had not full means of knowing whether said Mary Scott was dead, or in fact believed that she was dead, or did not know the cause of action for which said writ was sued, and the full particulars thereof. And because, it appears by said first count, that the plaintiff paid the said moneys under compulsion of law, without any fraud or extortion on the part of the defendant. The defendant also traversed the counts for money had and received, and for interest, respectively.

*T. O'Hagan* and *A. Close*, in support of the demurrer.

The principle is well settled, that money paid under compulsion

of law cannot be recovered back: *Brown* v. *M'Kinally* (*a*); *Marriott* v. *Hampton* (*b*). The cases upon this subject are collected in 2 *Smith, L. C.*, 4th ed., p. 325. The case of *Hamlet* v. *Richardson* (*c*) goes further than the present case, because there the jury found that the payment had been made without knowledge, or reasonable means of knowledge of the facts upon which the demand was made. Here, the means of knowledge were open to the plaintiff. *Hamlet* v. *Richardson* is approved of by Denman, C. J., in *The Duke de Cadaval* v. *Collins* (*d*). It is impossible to distinguish the present case from those which have been cited. It is conceded that, had fraud or extortion been averred, there would have been a cause of action; but neither is alleged; the plaintiff duly appeared to the writ, and took defence, and under compulsion of legal process paid the debt; neither is it averred that the defendant in this action knew that Mary Scott was alive.—[O'Brien, J. The plaintiff here avers that he made the payments confiding in, and giving credit to, the allegations and representations that Mary Scott was dead, and that John Smith Taylor was her legal representative.]—In *Hamlet* v. *Richardson*, the jury went further than that.—[O'Brien, J. They did not find that the payment was made upon the representations of the defendant.]—If the plaintiff is entitled to recover, he can do so upon the count for money had and received, which is not demurred to.

*Joy* and *T. K. Lowry*, contra.

In the case of *Hamlet* v. *Richardson*, before the writ was issued, the plaintiffs (who were defendants in a former action) had received letters addressed to them, stating the intention to sue for the money then in question, in terms sufficiently explicit to call their attention to the subject in dispute, after which the money claimed in that action was paid; and therefore it was a voluntary, not a compulsory, payment, under legal process, although after action brought; and upon that ground alone, the mistake, if at all, being one merely in point of law, the money could not be recovered back. The

(*a*) 1 Esp. 279.
(*b*) 7 T. R. 269.
(*c*) 9 Bing. 644.
(*d*) 4 Ad. & El. 858.

H. T. 1858.
*Queen's Bench*
CARSE
*v.*
TAYLOR.

other observations in the judgment of Tindal, C. J., in that case, were altogether extra-judicial, and unnecessary to the decision of the case before the Court. The true principle decided by the case of *Marriott* v. *Hampton* is stated by Lord Denman, C. J., in *The Duke de Cadaval* v. *Collins*, p. 863:—"It does not decide that money "obtained under compulsion of legal process can never be recovered "back; but only that, after the defence in an action has failed, and "money has been recovered in the action, in cannot be recovered "back in another action;" and Littledale, J., p. 865, also states the ground of the decision to be, that "an action did not lie to recover back that which had once been recovered under a legal decision." None of the cases, therefore, which have been cited upon the other side, can govern the present case; but in *Cripps* v. *Reade* (*a*), the circumstances were nearly similar to those in the present case, and it was there held that the action was maintainable. The principle of law contended for by the other side is, that there must be some end to litigation; and that the same sum cannot be put in litigation a second time and re-tried; but that principle cannot apply here, because the plaintiff is still liable to be sued upon this judgment by the *bona fide* owner of it. Next, the conusee of the judgment was represented to the plaintiff to be dead; but being in fact alive, the jurisdiction of the Ecclesiastical Courts did not attach, as they have only jurisdiction to grant letters of administration to deceased persons: *Allen* v. *Dundas* (*b*). In *Hamlet* v. *Richardson*, it was said that abundant notice was given, in the former action, of the nature of the claim; but, in the present case, it is averred that the payment was made upon the representations of the defendant in this action, that the conusee of the judgment was dead, and that the defendant was her legal representative; therefore, it must be admitted that the plaintiff made the payment upon untrue representations, and the demurrer must be overruled. They also cited *Fulham* v. *Down* (*c*).

*O'Hagan* replied.

(*a*) 6 T. R. 606. (*b*) 3 T. R. 125.

(*c*) 6 Esp. 26 *n*.

CRAMPTON, J.

We have no difficulty in arriving at a decision in this case. There is, no doubt, a multitude of cases reported on questions either the same as or similar to the present one; and perhaps there may be some conflict in the decisions, or rather, I should say, *dicta* of Judges in these cases; but the present case stands upon a peculiar ground, a ground recognised in the decisions which I have adverted to. If this case had been the case of an action brought to recover money paid under compulsion of of law, and there stopped, it would not be maintainable upon the authorities: that is plain; but it is equally plain, upon the same authorities, that, although the money was paid under compulsion, if there was fraud, misrepresentation, or falsehood inducing the party to make the payment, in such cases the general rule of payment under compulsion of law does not apply. It is impossible to speak in too high terms of that very excellent book of Mr. *Smith's* (*a*); he has summed up all the authorities upon this point, and that summary appears to me, so far as I have had an opportunity of considering it, to be very accurate and valuable. He says, most justly, in the three points which, in his opinion, result from all the authorities, "That money obtained by compul-"sion of law, *bona fide*, and without taking an undue advantage of "the situation of the party paying it, is not recoverable." I believe that is a just conclusion. He says again, "That money paid with "full knowledge of the facts is not recoverable, if there be nothing "unconscientions in the retaining of it;" and lastly, he says, "That "money paid in ignorance of the facts is recoverable, provided there "have been no laches in the party paying it." A man cannot say, I paid this money in ignorance of law; but ignorance in point of fact will, in certain cases, enable a party to recover back the money. Now, this plaint contains an averment which was relied upon by the plaintiff's Counsel; it is of great importance in the case, and seems to me to bring the case within one, if not two, of the rules laid down by Mr. *Smith*. What is this averment? It is, "That the plaintiff made such payment to the said John Smith

(*a*) 2 Smith's L. C. 4th ed., p. 340.

H. T. 1858.
*Queen's Bench*
CARSE
*v.*
TAYLOR.

"Taylor, confiding in, and giving credit to, the allegations and re-"presentations of the said John Smith Taylor." What were these allegations and representations? They were, that "Mary Scott was dead," and that "John Smith Taylor was her legal administrator;" these are matters of fact; the plaint then alleges that both these statements are untrue. Now we may suppose that, as to the fact of Mary Scott, who had obtained the judgment, being alive or dead, there was a mistake; and although it was a falsehood upon the defendant's part to say that she was dead, when in fact she was living, still that might have been a statement made *bona fide* and without fraud; but I cannot deal so lightly with the other statement, that John Smith Taylor was her legal representative. Was it true that he had obtained letters of administration, and did he show them to the plaintiff? We do not know how that is. If he had obtained them, they were unwarranted, and the Ecclesiastical Court must have been deceived and defrauded by somebody, because it had no authority to grant those letters. Then suppose Taylor had not obtained these letters of administration: he stated that he was the legal representative of Mary Scott; that statement was in point of fact untrue, he must have known whether he was so or not. Letters of administration cannot be obtained without an affidavit of the death of the person to whom the administration is sought, and this affidavit is generally made by the party obtaining the letters of administration. How then am I to take this allegation? Was there a fair representation made to induce the plaintiff to pay the money? I will give the defendant credit for supposing that Mary Scott was dead; but as to the manner in which the letters of administration were obtained, we are left entirely in the dark; and it appears to me that, whether the defendant obtained the letters of administration upon affidavit, or did not obtain them at all, in either case he made a false statement; and if any deception was practised as to having the letters of administration, or in obtaining them, that was not only a false representation, but a fraud. Now no case, nor even *dictum*, has been suggested upon the part of the defendant, to induce the Court to say that such misrepresentation

as this would not and ought not to take the case out of the general rule, that money which has been paid under compulsion of law cannot be recovered back. I take it there was compulsion of law, because a writ of revivor was issued, assuming the defendant to have been the proper legal representative; and it appears that the present plaintiff entered an appearance to the writ, and, after the appearance, under this compulsion of law, the sum demanded was paid; but was there not a clear mistake in point of fact, and was there not an untrue statement? Looking to the practice of the Ecclesiastical Court, or Court of Probate, as I must now call it, upon this subject, a practice of which I have, I may say, judicial knowledge, and looking at the extreme accuracy, and even punctiliousness, of that Court, in granting letters of administration, I find that if the letters were obtained, they must have been obtained by fraud. We have no difficulty, therefore, in dealing with the case upon this specific point; and upon this ground, which in fact was thrown out early in the case by my Brother O'Brien, I think that this demurrer is not well taken, and that judgment must be given for the plaintiff.

O'Brien, J., concurred.

Demurrer overruled.

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## FITZGERALD *v.* M'CULLAGH.*

*Jan.* 14, 15.

To an action for a breach of contract for the sale of land, in not furnishing the abstract of title within the time prescribed by the conditions of sale, the defendant was allowed to plead, by way of equitable defence, facts which amounted to a waiver, on the part of the plaintiff, of his right to insist upon the strict terms of the contract.

The summons and plaint in this case was brought upon foot of a breach of contract for the sale of lands, and for recovery of the deposit lodged with the auctioneer. It stated an agreement for the sale of the lands of Greenfield, held under an agreement for

* Perrin, J., *solus.*

H. T. 1858.
*Queen's Bench*
FITZGERALD
*v.*
M'CULLAGH.

a lease for lives renewable for ever, with conditions of sale for payment of a deposit of £10 per cent. on the purchase-money, and for payment of the residue thereof within a limited time, and that the deeds of assignment should be prepared at cost of the purchaser, and that the vendor should, at his own expense, within ten days from the day of sale (if required), prepare and deliver to the purchaser, or his agent, an abstract of the title, and deduce title to the premises sold, down from the 13th of December 1850; and also should procure a lease to be executed to him, pursuant to the agreement, and should assign the same to the purchaser.

Averment.—That the plaintiff became the purchaser, and duly paid the deposit and auction fees, and signed an agreement for the payment of the residue of the purchase-money. Breaches.—That the defendant did not within ten days deliver the abstract, nor within a reasonable time procure the lease to be executed, pursuant to the agreement, or assign same to the plaintiff, according to the said conditions of sale.

The plaint also contained a count for money had and received.

*E. Beytagh* applied for liberty to plead defences, of which the following are abstracts:—

First.—A traverse of the alleged breach of contract, by non-delivery of an abstract of title within the prescribed period.

Secondly.—An equitable defence to the same alleged breach of contract, on the ground of a waiver of the right to insist upon it, showing the facts evidencing such waiver.

Thirdly.—An equitable defence to the alleged breach of contract, by non-procurement of a lease from the head landlord, and non-assignment of it to the plaintiff, on the ground of a substantial and sufficient equitable fulfilment of the contract by the defendant, and a waiver by the plaintiff of any right to insist upon a more formal compliance with its terms.

Fourthly.—A traverse of the count for money had and received.

*Jan.* 15. PERRIN, J., now granted the motion.

## ROE, Administrator of Boyle, *v.* HOGG.*

*Feb.* 1.

Where a demurrer has been taken to a replication, and judgment given on the demurrer in favour of the plaintiff, no issue in fact can be taken upon the matters of fact stated in the replication.

THIS was a motion by way of appeal from the order of CRAMPTON, J., in Chamber, dated 28th of January 1858, on the settlement of the issues for trial. The plaintiff sued as administrator of Mary Boyle, deceased, under Lord Campbell's Act (9 & 10 *Vic.*, c. 93), alleging that the death of the said Mary Boyle had been caused by the horse of the defendant, while being trained and broken, knocking down and running over the said Mary Boyle, in Sackville-street in the city of Dublin. The defendant had pleaded pleas traversing the causes of action in the summons and plaint; and also, thirdly, a special defence, alleging that one Peter Lalouette was a trainer of horses in the city of Dublin, and that the defendant had delivered the said horse to the said P. Lalouette to be trained, for reasonable reward, and delivered the said horse into the possession of the said P. Lalouette for that purpose. That the said horse, while in the sole possession and under the control of the said P. Lalouette, committed the injuries in the plaint mentioned, and that said Lalouette never was the defendant's servant in the premises. To this third defence, the plaintiff filed a replication, averring that the defendant was present at the time when the said horse killed the said Mary Boyle, and that it was under the defendant's direction that the said P. Lalouette broke and trained the said horse, in Sackville-street in the city of Dublin, on the occasion of the accident. No other replication was filed. The defendant demurred to this replication; and the plaintiff obtained judgment on the argument of the demurrer. The plaintiff then served notice of trial, tendering issues on the several defences which traversed the plaint, and also tendering, as the eighth issue, "is the replication to the third defence true in substance and in fact?" The defendant objected to this last issue; but CRAMPTON, J., in Chamber, allowed it to stand. From

* *Coram* CRAMPTON and O'BRIEN, JJ.

H. T. 1858.
*Queen's Bench*
ROE
*v.*
HOGG.

that ruling the defendant now appealed, seeking to have the ruling of the learned Judge varied, by striking out that issue, on the ground that no issue in fact was raised by the pleadings.

*Macdonogh* (with him *D. C. Heron*).

The plaintiff having already obtained judgment on the demurrer to this replication, the issue in fact arising upon that replication cannot now be tried by a jury. Whatever benefit, therefore, the plaintiff obtained by that judgment, he cannot now apply it to the other issues arising on the record, and which must be tried by the jury. The plaintiff evidently seeks to have this issue tried, as being favourable to him, and to import into the rest of the case the matters of fact stated in the replication. The Common Law Procedure Act has made no alteration. The law is, if, besides the issue in law on the demurrer, there are issues in fact on the other pleas, and judgment has been given for the plaintiff in the former, then this judgment is interlocutory, and the plaintiff should proceed to a trial of the issues in fact, and to inquire of the damages upon the issue in law: 2 *Arch. Prac.*, by *Chitty*, p. 835, 8th ed. When the plaintiff obtains judgment at any stage of the proceedings, unless the defendant get leave to amend, the plaintiff must have his damages inquired into as a matter of form: 2 *Chitty's Forms*, p. 295, 6th ed.

*R. Armstrong* (with him *S. Ferguson*), contra.

Under the old practice, there would be judgment for the plaintiff on the third defence generally; but the question here is, whether, under the present practice, the overruling of the demurrer admits the replication to be true in substance and in fact? The safer course would be to have the issues in fact sent to the jury. We give the defendant all the benefit of the traverse and the demurrer. If the abstract of Nisi Prius contain a recital that the replication is true in substance and in fact, that would answer all purposes.

*Per Curiam.*

Let the motion be granted, without costs.

## HOLMES *v.* SMITH.

*(Common Pleas.)*

*Nov.* 21, 25.

In an action brought by an administratrix for money lent, paid, &c., and for work and labour done by the intestate in his lifetime, to and for the defendant, the latter pleaded, as to a portion of the cause of action, the Statute of Limitations. The plaintiff, in order to take the case out of the operation of the statute, relied upon the following passage in a letter written by the defendant to her attorney, within six years next before the commencement of the suit:—"If Mrs. H. (the plaintiff) can prove I owed her late husband any money for costs or otherwise, I am willing to have it settled at once. This can easily be done by producing the receipts for the amounts of money he had of mine in his hands."—*Held*, that as the condition specified in the letter, regarding the production of receipts, did not appear to have been performed by the plaintiff, prior to the commencement of the action, the document was not evidence of such a promise to pay the debt on request, as would defeat the bar of the Statute of Limitations.

*Semble*—That in order to entitle a personal representative to rely upon an acknowledgment made to himself by the debtor, as taking the case out of the operation of the Statute of Limitations, a count is required similar to that used under the former rules of pleading, stating that the defendant promised to pay the personal representative on request.

THIS was an action brought by the plaintiff, as administratrix of her late husband Joseph Holmes, against the defendant, to recover £1357. 2s. 10½d., for work and labour, money paid, &c., by the deceased in his lifetime, for the defendant. The summons and plaint stated that the defendant was indebted to the plaintiff, as administratrix of the late Joseph Holmes, in the sum of £1129. 18s. 4½d., for money lent by said Joseph Holmes in his lifetime to the defendant, at his request; and in the sum of £1129. 18s. 4½d., for money paid by said Joseph Holmes in his lifetime, for the defendant, at his request, and for money received by the defendant for the use of the said Joseph Holmes in his lifetime; and in the sum of £227. 4s. 6d., for work and materials provided by the said Joseph Holmes in his lifetime, as attorney and solicitor for the defendant, at his request; and in the sum of £1357. 2s. 10½d., for money found to be due from the defendant to the said Joseph Holmes in his lifetime, on accounts stated between them: and for a further cause of action, the plaintiff, as such administratrix, alleged that the defendant was indebted to her in the above sum of £1129. 18s. 4d., for money lent by the said Joseph Holmes, and for money paid, &c., and for money received, &c., and in the sum of £227. 4s. 6d., for work and labour, &c. Averment.—That the said Joseph

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

Holmes, in his lifetime, had in his possession certain title-deeds, leases and other papers of the defendant; and that as administratrix as aforesaid, and upon the death of the said Joseph Holmes, she became possessed of the said deeds, leases and papers, and was entitled to a lien thereon for the said moneys, and afterwards delivered up and handed over the said title-deeds, leases and other papers to the defendant, at his request, and upon his undertaking to pay the said last mentioned sums, then due; and that in consideration thereof, the defendant then promised the plaintiff, as such administratrix as aforesaid, to pay her the said several last mentioned moneys, upon request. The plaintiff also alleged a similar promise, for a like consideration, to pay on request £227. 4s. 6d., for costs and work done by the said Joseph Holmes as attorney for the defendant. There was a further averment that the defendant, by a letter dated the 3rd of December 1855, promised the plaintiff to pay her the sums due on the accounts aforesaid.

The defendant denied the several material allegations in the summons and plaint. As to the several causes of action, except those for work done, &c., by the said Joseph Holmes as attorney for defendant, he also pleaded the Statute of Limitations. As to the latter causes of action, he pleaded payment and set-off, to which last plea the plaintiff replied. The cause was tried before MONAHAN, C. J., at the Sittings after Trinity Term 1857, when the plaintiff produced receipts and documents, and called witnesses to vouch and prove all the items of the account, the earliest of which was of the date of Nov. 8, 1833; and having actually proved the greater number of the items, and having also proved the retainer of Joseph Holmes by the defendant as his attorney and solicitor, and business done by said Joseph Holmes for the defendant, it was arranged, at the suggestion of the LORD CHIEF JUSTICE, that the costs should be taxed, and that the Master should examine the account. The plaintiff then, in order to avoid the Statute of Limitations, relied on two matters; first, she called witnesses to prove that her attorney Mr. Ellis had the possession of certain deeds the property of the defendant; that the defendant's attorney, Mr. Mayne, in order to get possession of these deeds, verbally

promised that, if the deeds were given up, the plaintiff's general demand should be paid; that in consideration of this promise, the deeds were given up, and that this transaction occurred in 1854. The defendant's attorney was examined, and stated that the promise was confined to the demand for costs, but admitted the other parts of the transaction. Secondly, the plaintiff proved the following letter, written by Mr. Ellis, the defendant's attorney, viz.—

"3rd Dec. 1855.

"DEAR ELLIS.—Mayne has written me, to say a note I wrote "you early in 1854, relative to Mrs. Holmes' claim for costs, alleged "to be due by me to her late husband, has been mislaid; though "he and I were under the impression it had been given to you at "the time you handed over the deeds relating to my property. I "was always anxious to settle accounts with Mr. Holmes, he having "received £3200, on account of money advanced on mortgage by "Messrs. Needham & Wisdom; on speaking to him on the subject, "his invariable reply was 'I'll take care and pay myself.' I gave "Mr. Holmes a list of creditors I wished paid; I know of one "in particular, a coach-maker in Bath, whose account never was "settled by him. *If Mrs. Holmes can prove that I owed her "late husband any money for costs* or otherwise, I am willing to "have it settled at once; this can easily be done by producing "the receipts for the amount of money he had of mine in his hands, "£3200.—Yours truly, (Signed) H. J. SMITH."

Counsel for the plaintiff contended that the above letter took the case out of the Statute of Limitations. The LORD CHIEF JUSTICE left to the jury the question, whether Mr. Mayne's undertaking went to the costs only, or to both the costs and the demand for money paid to the use of the defendant? The jury found, in favour of the defendant, that the parol undertaking applied to the costs only. His Lordship also left to the jury the question, whether the defendant's own letter applied to both demands or only to the claim for costs? The jury found, in favour of the plaintiff, that it applied to both demands. His Lordship then directed a verdict for the plaintiff, upon the fifth issue, which related to the plea of the Statute of Limitations; and he reserved leave to the

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

defendant to move to have the same turned into a verdict for himself upon said issue, in case the Court should be of opinion that the letter of the defendant was not a sufficient promise or acknowledgment, within Lord Tenterden's Act (9 *G.* 4, c. 14, s. 1, re-enacted by 16 & 17 *Vic.*, c. 113, s. 24), to take the case out of the operation of the Statute of Limitations. A verdict was then found for the plaintiff, for £1357. 2s. 10d. damages, and sixpence costs; and it was ordered by the LORD CHIEF JUSTICE that the costs sued for should be taxed, and that it be referred to Master Burke to take the account, and that the amount of the verdict should be varied according to the reduction, if any, made upon the said taxation and the taking of the account.

A conditional order having been granted, pursuant to leave reserved, to set aside the verdict had for the plaintiff, on the issue joined on the plea of the Statute of Limitations, and to enter a verdict for the defendant on said issue, cause was shown against making the same absolute, by—

*Napier* (with whom were *Whiteside* and *R. R. Warren*).

*Fitzgibbon* and *H. Smythe*, contra, appeared to support the conditional order.

The following cases were cited: *Lechmere* v. *Fletcher* (*a*); *Bird* v. *Gammon* (*b*); *Colledge* v. *Horn* (*c*); *Gardner* v. *M'Mahon* (*d*); *Edmonds* v *Goater* (*e*); *Sidwell* v. *Mason* (*f*); *Tanner* v. *Smart* (*g*); *Smith* v. *Horne* (*h*); *Heylin* v. *Hastings* (*i*); 2 *Wms. Saund.*, p. 64 *d*; *Hayden* v. *Williams* (*k*); *Spong* v. *Wright* (*l*); *Cripps* v. *Davis* (*m*); *Linley* v. *Bonsall* (*n*); *Hart* v. *Prendergast* (*o*).

*Cur. ad. vult.*

(*a*) 1 Cr. & Mee. 637.

(*b*) 5 Sco. 213; S. C., 3 Bing. N. Cas. 883.

(*c*) 10 B. Moo, 437; S. C., 3 Bing. 119. (*d*) 3 Q. B. 561.

(*e*) 15 Beav. 415. (*f*) 2 Exch. Rep., N. S., 306.

(*g*) 6 B. & C. 603. (*h*) 18 Q. B. 134.

(*i*) Com. Rep. 55; S. C., 1 Ld. Raym. 389, 421; S. C., 1 Salk. 29; S. C., 5 Mod. 425.

(*k*) 7 Bing. 163. (*l*) 9 M. & W. 629.

(*m*) 12 M. & W. 159. (*n*) 2 Sco. 399.

(*o*) 14 M. & W. 741.

MONAHAN, C. J., now delivered the judgment of the Court.

This case comes before the Court on a motion to enter a verdict for the defendant, instead of the verdict found for the plaintiff, pursuant to leave reserved by me at the trial. I held, at the trial, that the letter written by the defendant was a sufficient answer to a defence of the Statute of Limitations relied on by him, reserving leave to the defendant to have the verdict entered for him, if the letter were no sufficient answer.

The plaintiff sued as administratrix of her deceased husband, Joseph Holmes. The summons and plaint alleged that the defendant was indebted to the said Joseph Holmes in his lifetime, for money lent by the said Joseph Holmes to the defendant, and for money paid by the said Joseph Holmes for the use of the said defendant, amounting to the sum of £1129. 18s. 4d., and in a further sum of £227. 4s. 6d., for work and labour done by the said Joseph Holmes as the attorney and solicitor of the said defendant, on his retainer. It is then alleged, for a further cause of action, that these moneys being due to the plaintiff as administratrix of the said Joseph Holmes, and while she, as such administratrix, had in her possession several title-deeds of the defendant, he, in consideration of her delivering up to him those deeds, undertook to pay her those several debts or sums so due to the said Joseph Holmes. There is a further count or paragraph stating the promise of the defendant to her to pay the sum so due for costs. The summons and plaint then contains an averment that, by letter, dated the 3rd of December 1855, the defendant promised the plaintiff to pay her the sum due on the accounts aforesaid.

To this summons and plaint the defendant pleaded a defence, which certainly, under the old system of pleading, would be considered rather singular, consisting as it did of distinct traverses of each of the allegations contained in the summons and plaint; and as to the demand for money lent and money paid, the defendant also pleaded the Statute of Limitations. This latter defence was not pleaded to the demand for costs due to the late Mr. Holmes, as the attorney and solicitor of the defendant.

At the trial, it appeared that the late Mr. Holmes had been the

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

solicitor of the defendant, who is a gentleman of landed property. It further appeared that the defendant, being indebted to several persons in various sums of money, wished to raise a sum by mortgage, which was supposed to be sufficient to pay off the debts he so owed. It appeared that Mr. Holmes received the amount of the mortgage money; but after a very expensive investigation at the trial, and a reference to the Master of the Court, by consent of the parties, it appeared that the debts paid by Mr. Holmes, and the other sums laid out by him for the use of the defendant, exceeded the amount of the mortgage money received by him for defendant's use, by a sum exceeding £1100; and that this sum, together with certain bills of costs, amounting to about £227, was *bona fide* due by the defendant to Mr. Holmes, his solicitor, at the time of his decease, which occurred more than six years before the commencement of the present suit. It further appeared that, at the period of Mr. Holmes' death, a number of the defendant's title-deeds were in his possession, and after his death were in the possession of the plaintiff, as his administratrix, or rather of Mr. Ellis her attorney, who was employed by her to act as her solicitor and attorney in calling in the assets of her late husband. It further appeared that the defendant Mr. Smith, having occasion for the title-deeds so in the possession of the plaintiff Mrs. Holmes and her solicitor Mr. Ellis, he, the defendant, and Mr. Mayne his solicitor on his behalf, applied to Mr. Ellis for the deeds, of which, however, he refused to part with the possession, unless Mr. Smith would write to him a letter undertaking not to rely on the Statute of Limitations in answer to Mrs. Holmes' demand. Mr. Mayne, on the part of Mr. Smith, expressed his willingness to give such a letter, and Mr. Ellis retained the deeds, intending to do so until he got the required letter. Mr. Ellis, however, having had occasion to go to London, and there being a very great intimacy between him and Mr. Mayne—they being, I believe, also next-door neighbours—Mr. Mayne obtained the deeds from Mr. Ellis' clerk, stating, according to the recollection of the clerk, that Mr. Ellis had desired him to get the deeds, and without giving the promised letter. Mr. Mayne's recollection, however, was, that previous to getting the deeds, he had given

to Mr. Ellis' clerk the promised letter, which, however, Mr. Ellis and his clerk stated they never received or saw. In some time after, Mr. Ellis applied to Mr. Mayne, and required him to obtain from his client Mr. Smith such letter as he had promised; and in pursuance of such request, the defendant Mr. Smith wrote and forwarded to Mr. Ellis the letter dated the 3rd day of December 1855, on which the question as to the Statute of Limitations depends. The first question that arose at the trial, totally irrespective of the letter, was as to what was the promise made by Mr. Mayne as the attorney and agent of the defendant, in consideration of getting up the title-deeds? On this there was a great difference of recollection between Mr. Ellis and Mr. Mayne; Mr. Ellis stating that the promise applied to the entire of Mrs. Holmes' demand; Mr. Mayne, on the other hand, stating that, at the time of the obtaining possession of the deeds, no claim had been made by Mrs. Holmes, except on foot of costs, and that neither he nor Mr. Smith were aware of Mrs. Holmes, or Mr. Holmes in his lifetime, having any claim for money advanced by him. On this conflict of evidence, I left the question to the jury as to what the promise, in fact, was, in consideration of the getting up the deeds. They acted on Mr. Mayne's account of the transaction, and found that the promise was confined to the costs, for which the plaintiff has obtained a verdict without objection. The plaintiff's Counsel then insisted at the trial, that the letter of the defendant afforded a sufficient answer to the defence of the Statute of Limitations; and that the letter embraced not merely the costs, but also the demand for money paid, the subject of the present action. I left to the jury the question whether the letter referred to the last mentioned demand? the jury were of opinion that it did; and thereupon I ruled, for the purpose of the trial, that the letter was an answer to the statute, and directed a verdict for the plaintiff, reserving liberty for the defendant to apply to have it changed into a verdict for him, if at the trial I ought to have held that the letter was no answer to the defence of the Statute of Limitations; and this now is the question we have to decide. No objection was raised at the trial, that the summons and plaint was not properly framed, so as to raise the

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

question, and we do not mean to raise any such objection here; but I cannot avoid saying that I think, where an action is brought by a personal representative, the testator or intestate being more than six years dead, it would be advisable in the summons and plaint to have a distinct paragraph, similar to the count which was always introduced into the old forms of declaration, namely, one stating the existence of the debt at the time of the death of the testator or intestate; and in consideration thereof, a promise to the personal representative, the plaintiff, to pay it on request. Possibly, in the present case, the averment at the end of the summons and plaint, that the defendant, by letter, dated the 3rd of December 1855, promised to pay on request, might be considered as an informal count, of a similar effect. Be this as it may, no such objection was made at the trial; if it had been, I would have allowed the summons and plaint to be amended; and therefore, we now proceed to deal with the case as if the summons and plaint contained a distinct cause of action, stating that the defendant, being indebted to the deceased Mr. Holmes, at the time of his death, in the several sums stated in the summons and plaint, in consideration thereof, promised the plaintiff, as his personal representative, to pay them on request: and the question is, whether the defendant's letter, of the 3rd of December 1855, is evidence of that promise, and sufficient to take the case out of the Statute of Limitations? This letter, dated the 3rd of December 1855, is in the handwriting of the defendant, and is directed to Mr. Ellis, the agent and solicitor of Mrs. Holmes; and, so far as material, is in these words:—

"3rd Dec. 1855.

"I was always anxious to settle accounts with Mr. Holmes, he "having received £3200 my account of money advanced on mort-"gage by Messrs. Needham & Wisdom. On speaking to him on the "subject, his invariable reply was, 'I'll take care and pay myself.' "I gave Mr. Holmes a list of creditors I wished paid. I know of "one in particular, a coach-maker in Bath, whose account was never "settled by him. If Mrs. Holmes can prove that I owed her late "husband any money for costs or otherwise, I am willing to have it

"settled at once. This can easily be done, by producing the receipts "for the amount of money he had of mine in his hands, £3200."

We have been referred to a great number of cases by the Counsel for the plaintiff, many of which contain expressions not so strong as those in this letter, which have been held a sufficient answer to the Statute of Limitations. If, in any of those cases, expressions similar or tantamount to those in the letter before us have been held sufficient, we would not be justified in adopting a different rule in the present case, unless we were clearly satisfied that that case had been decided on some mistaken principle; as it certainly is a matter of very great importance that Courts of Justice should not only adopt the principles of former well-considered decisions, but should also, as far as possible, adopt the decisions as to particular cases coming within such principles. As to the present case, we do not think that any of the cases cited govern it, with regard to the expressions used, and therefore we feel bound to ascertain the principle applicable to such cases. It is quite useless to refer to the early cases on the subject, it being quite impossible to reconcile them with each other. The leading modern case, which lays down a clear rule on the subject, is *Tanner* v. *Smart* (*a*). That was an action on a promissory note, which became due in 1816. In 1819, the defendant, the maker of the note, on being asked for payment, said, "I cannot pay the debt at present, but I will pay it as soon as I can." In that case, there was no doubt but that the defendant admitted the existence of the debt. On a full consideration of the statute, and the several cases decided on it, which were found to be utterly irreconcileable, Lord Tenterden and the other Judges of the Court came to the conclusion that the acknowledgment was insufficient, and that there should be either an express promise to pay on request, as alleged in the declaration, or such an admission of the existence of the debt as that the law would imply a promise to pay on request, which could not be implied when the admission, however clear as to the existence of the debt, was accompanied either by a refusal to pay, or a promise to pay in a future event or contingency, there being no evidence of the hap-

(*a*) 6 B. & C. 603.

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

pening of such event or contingency. In the case of *Tanner* v. *Smart*, it was unnecessary to consider whether it was necessary to declare specially on such a conditional or contingent promise, or whether it would be sufficient to declare generally, as on a promise to pay on request, and prove, by evidence at the trial, the happening of the event or contingency. Possibly, whenever it is necessary to decide that point, it may be found in analogy to the case of goods sold on credit, or to be paid for by bills of exchange, that, when the credit is expired, or the time arrived when the bills of exchange, if given, would have been due, an action for goods sold and delivered, to be paid for on request, can be sustained. Such a general declaration may suffice, on this principle, that when goods have been sold and delivered, or any such cause of action has accrued, and when the time of payment has arrived, where goods are sold on credit, or the contingency has happened on which they are to be paid for, the defendant is in fact then presently indebted, and the law will possibly imply a promise to pay on request. And, accordingly, in the case of a promise to pay, if or when of ability, it may be sufficient to declare generally, and give evidence of the ability, which must, of course, be evidence of ability before the commencement of the action, and not merely at the time of the trial. The case of *Hayden* v. *Williams* (*a*) arose after Lord Tenterden's Act. . In that case, the letter of the defendant, on which the plaintiff relied, had been lost; and the Court held that secondary evidence of the letter was properly received in evidence; but the letter being, that the defendant was then incapable of paying, but would as soon as he had it in his power, the Court held the evidence not sufficient, there being no evidence of ability to pay, and expressly avoided deciding whether such a promise should not have been specially declared on. They clearly held that there should be evidence of the defendant's ability to pay prior to the commencement of the action. In all the cases which have since arisen, the Courts have professed to adopt the principle so clearly laid down by the Queen's Bench and Common Pleas, in the two cases to which I have referred; and in no case has the acknowledgment or promise been held sufficient,

(*a*) 7 Bing. 183.

except where the Court were of opinion that there was nothing inconsistent with an absolute unqualified promise to pay the debt. Applying these principles to the defendant's letter, the first question is, whether it contains a clear admission of a debt? Does not the early part of the letter rather imply the opinion of the defendant that no sum was due to Mr. Holmes? The defendant says, he was anxious to settle, Mr. Holmes having received a large sum of his money; that Mr. Holmes always stated he would pay himself, and that some of the debts he was to have paid had remained unpaid. So far from this amounting to the admission of a debt, it seems rather to imply the opinion of the writer that, if an account were taken, no debt would be found due. But even if the letter contained an admission of the existence of a debt, still, as it is accompanied with a promise, the question is, what is the true construction of that promise? The words are, "If Mrs. Holmes can prove I owed her "late husband any money, for costs or otherwise, I am willing to "have it settled at once." If the letter had stopped here, it might possibly be supposed that the proof required was to be given in an action, and that it would be equivalent to saying, "I do not believe I owe anything, but, if I do, I am willing and undertake to pay;" in which case it would perhaps be held that if the debt existed, the party was liable to pay; but, construing the part of the letter I have read by that which follows, "This is easily done, by producing the vouchers for the amount of money he had of mine in his hands," is not the meaning of the entire letter clearly this:—If Mrs. Holmes, by producing receipts for payments made by her husband, on my account, exceeding the £3200 money of mine in his hands, prove I owed him anything, I am willing to have it settled at once? Perhaps some question might arise, whether having it settled at once meant immediately paying the amount; but assuming that such is the construction, is it not clear that, before the payment or settling, the existence of the demand was to be established by the production of the vouchers? and if so, is not the fair meaning of the letter, that these are to be produced to the defendant before his liability accrues, and not, that the liability is for the first time to be established by the evidence at the trial? The

M. T. 1857.
*Common Pleas.*
HOLMES
*v.*
SMITH.

only authority to which we were referred, or have been able to find, bearing on this part of the case, is the old one of *Heylin* v. *Hastings*, reported in *Comyn*, *Lord Raymond* and *Modern Reports*, and fully stated in the case of *Tanner* v. *Smart*. The action was by an executor, for goods sold by his testator; the defendant within six years had said, "If you can prove your debt I will pay it." After a good deal of consideration and some hesitation, the Court held this promise sufficient, the plaintiff at the trial proving the existence of the debt. This case was rightly decided, if the true construction of defendant's promise was, "if at the trial you prove your debt, I will pay it;" as, if that be the meaning, it amounts merely to this, if I owe I will pay; but it does not in our opinion apply to the present case, in which we think, according to the fair construction of defendant's letter, no liability was to arise until the existence of a demand against him was first established by producing vouchers, showing that the £3200, received by Mr. Holmes for him, had been expended. On the whole, therefore, there having been no evidence, at the trial, of the performance of what we consider as in the nature of a condition precedent to the accruing of the defendant's liability, we must, in pursuance of the leave reserved at the trial, order the verdict to be entered for the defendant; and with respect to Mr. *Whiteside's* application for liberty to appeal from our order, it is enough to say, that no such liberty is necessary; for the party, under the Act of Parliament, has a right to appeal, the point having been saved at the trial.

BALL and KEOGH, JJ., concurred.

JACKSON J., not having been present at the argument, did not take part in the judgment of the Court.

Rule absolute.

H. T. 1858.
*Common Pleas.*

FITZGERALD *v.* WESTROPP and others.

*Jan.* 26.

Under the provisions of section 89 of the Common Law Procedure Act (1856), the Court will restrain the defendant from setting up temporary bars generally, in an action of ejectment.

THIS was an application that the defendant should waive temporary bars.

In this case, an action of ejectment had been brought by the plaintiff, to recover the possession of certain lands in the county of Clare; and the chief question arose upon the construction of the will of the late John Westropp, which was executed in the year 1845. The case came on for trial before Crampton, J., at Ennis, at the Summer Assizes 1857; and the defendant gave in evidence, amongst other matters, five indentures of lease of the premises in question, executed to tenants by the testator when in possession, and bearing date respectively the 1st of May 1843, the 1st of May 1851, the 29th of March 1851, the 2nd of October 1845, and the 14th of June 1843; the terms contained in which were still subsisting. The entire premises for which the ejectment was brought were comprised in the leases in question. A verdict for the plaintiff having been found, under the direction of the learned Judge, a bill of exceptions was brought, and the verdict set aside; and the plaintiff, having brought a second ejectment, sought by the present application to restrain the defendant from setting up the technical defence founded upon the above leases; the ejectment not having been brought for the purpose of disturbing the tenants holding under them, but solely to decide upon the true construction of the will of John Westropp.

*Butt*, in support of the application.

This case comes clearly within the provisions of the Common Law Procedure Amendment Act (1856), s. 89; the words of which are, "It shall be lawful for any of the Superior Courts, "&c., to make an order directing *temporary bars* to be waived,

H. T. 1858.
*Common Pleas.*
FITZGERALD
*v.*
WESTROPP.

"and the real title tried in such ejectment;" and, therefore, the order of the Court should direct the defendant to waive the leases in question, or any other temporary bars that may impede the trial of the real title to the lands.

*C. Barry*, contra.

The notice should specify the particular modes of defence which the defendant is not to avail himself of, as he may have several other defences besides the leases in question. The order should not be a general one.

MONAHAN, C. J.,

I am of a different opinion. There can be no question but that these leases amount to temporary bars; and the order that we shall make will be, to prohibit the defendant from relying upon these or any other temporary bars.

Rule accordingly.

## MUNCE *v.* BLACK.

*(Exchequer.)*

*Jan.* 28.

A summons and plaint for maliciously and falsely exhibiting an affidavit, containing false statements, to the Commissioners of the Incumbered Estates Court, and thereby causing an injunction for possession to be issued out of said Court, whereby the plaintiff was turned out of the possession of certain lands:—*Held*, bad on demurrer, as not showing that the injunction (being the process of a Court of competent jurisdiction) was at an end or determination.

THE summons and plaint in this case alleged that the plaintiff was a tenant from year to year of a certain farm, which was sold to the defendant in the Incumbered Estates Court, subject to the plaintiff's said tenancy; and that a conveyance was duly executed to the defendant, of the said lands, subject to the plaintiff's tenancy as aforesaid, by the Commissioners of that Court. That after said sale and conveyance, and whilst the plaintiff was so possessed of said premises, the defendant, maliciously intending and devising to oppress and injure the plaintiff, and to cause him to be unjustly evicted from his said farm, and deprived of the benefit of the crops then growing thereon, on the 22nd of June 1857, in order to carry into effect his said malicious intention, wrongfully, deceitfully, falsely and maliciously, and without any reasonable or probable cause whatever for issuing the injunction thereinafter mentioned, did suggest and represent, and cause to be made and exhibited to the said Commissioners, in their said Court, a certain affidavit, duly sworn by one A. Black, falsely representing and stating that, on the 19th of June 1857, the said A. Black repaired to the residence of the plaintiff, and produced and showed to him (the plaintiff) the original deed of conveyance from the said Commissioners to the defendant, together with a memorandum of agreement; and that the said A. Black read the said deed and agreement respectively to the plaintiff, and requested him to sign said agreement, and to become tenant to the defendant, at the rent returned in the said deed; and that the plaintiff refused to do so, and that the plaintiff used threatening language towards the said A. Black, and told him he would never pay one penny of rent to the defendant or any other person, and

H. T. 1858.
*Exchequer.*
MUNCE
*v.*
BLACK.

that he would hold possession in defiance of the defendant or any person on his behalf, as he had never got possession from the defendant.

That the said representations contained in the said affidavit were, and each of them was, to the knowledge of the defendant, false in substance and fact. That by means of such false and deceitful representations and affidavit, afterwards, on the 23rd of June 1857, there did issue out of the said Incumbered Estates Court, and the defendant, by means of such unjust, false and deceitful representations and affidavit, did cause and procure to be issued from the said Court, an order, whereby it was ordered by the Commissioners that the plaintiff should, within ten days after service thereof, attorn to and become tenant to the defendant, at the rent set forth in the said conveyance, on a memorandum of attornment being tendered to him; or in default thereof, that an injunction should issue to the Sheriff of the county of Down, to put the defendant into actual possession of that part of the property so sold and conveyed to the defendant, as aforesaid, which was in the tenancy or occupation of the plaintiff. That the defendant, further maliciously intending to injure the plaintiff, afterwards, on the 29th of June 1857, in order to carry into effect his said malicious intention, wrongfully, deceitfully, falsely and maliciously, and without any reasonble or probable cause whatever for issuing the injunction thereinafter mentioned, did suggest and represent, and cause to be made and exhibited to the said Commissioners in their said Court, a certain other affidavit, duly sworn by the said A. Black, representing and stating that, on the 25th of June 1857, he, the said A. Black, had served the plaintiff with the said conditional order of the 23rd of June, by delivering unto and leaving with the plaintiff in person, at his dwelling-house, a true copy of the said order; and that he, at the time of service, showed plaintiff the said original order, and explained to him the nature of the same, and also produced the original memorandum of agreement, and requested plaintiff to sign the same, and to attorn and become tenant to the defendant; and that the plaintiff refused, and that the plaintiff, immediately

after receiving the said copy, tore and destroyed the same in the presence of the said A. Black, and used threatening language towards him; and that the plaintiff said he did not care anything for said order or any other order which might issue, and that he would never pay any rent to the defendant, and would never give up possession; and that on departing from the said dwelling-house, there were several stones thrown at him (the said A. Black), by some person therein, and that he was in imminent danger of receiving violence and injury from the plaintiff. That the representations and statements contained in the said last-mentioned affidavit were, and each of them was, to the knowledge of the defendant, false in substance and fact. That by means of such unjust, false and deceitful representations, and last-mentioned affidavit, afterwards, on the 8th of July 1857, there did issue out of the said Incumbered Estates Court, and the defendant, by means of such unjust, false and deceitful representations and affidavit, did cause and procure to be issued from the said Court, and under the seal of the Court, a writ of injunction, whereby it was ordered by the Commissioners that the Sheriff of the county of Down should be, and he was thereby required and commanded, immediately after sight or receipt of the said writ, to go to that part of the said lands in the occupation of the plaintiff, and, without delay, to give or cause to be given to the defendant or his assigns the possession of that part of the lands and premises so purchased by him as aforesaid, and which was in the tenancy and occupation of the plaintiff, and to support the defendant or his assigns in such possession. That by means of the said false representations and last-mentioned affidavit, the said writ of injunction was delivered to the Sheriff of the county of Down on the 9th of July; and the defendant, in further prosecution of his said malicious intention, on the said 9th of July, caused the said writ to be delivered to and lodged with the Under-sheriff of the said county, to be executed in due form of law; by virtue whereof, and in obedience whereunto, he executed the said writ, by turning the plaintiff and his family out of the said premises, and giving the possession thereof, with the crops, to the defendant. That in truth and in

H. T. 1858.
*Exchequer.*
MUNCE
*v.*
BLACK.

fact the plaintiff was not served with the said conditional order or memorandum of attornment, nor did he refuse to become tenant to the defendant or to sign said memorandum; which matters and things the defendant, at the times aforesaid, well knew, and also knew that there existed no valid reason for the issuing of the said injunction, and no valid grounds for obtaining the same; by means of which said false and deceitful representations and suggestions and affidavits, and malicious suing out and prosecuting the said writ of injunction against the plaintiff, and the proceedings thereon had, the plaintiff was deprived of the use of his farm from thence hitherto, and was likewise during all that time prevented from reaping the crops which he had sown on his said farm, and was deprived of the profits he might and would have derived from the cultivation thereof.

Demurrer to the summons and plaint, as not showing any termination of the process of the Incumbered Estates Court.

*Crawford*, with whom was *Napier*, for the demurrer.

The injunction was issued in this case under the 29th section of the Incumbered Estates Act (12 & 13 *Vic.*, c. 77); and no person is liable for putting the process of a Court of competent jurisdiction in force, unless a termination of that process be shown. No action lies for a malicious prosecution for a criminal offence, unless a termination of the prosecution be shown: *Selwyn's N. P.*, p. 1069. In an action for maliciously suing out a commission of bankruptcy, the termination of the proceedings should be shown: *Whitworth* v. *Hall* (*a*), recognised in *Athinson* v. *Raleigh* (*b*). In *Daniels* v. *Fielding* (*c*), there was an averment of the termination of the proceedings, so that case does not touch the present. If the defendant made use of the process of the Court to effect a purpose not within the exigency of the writ, he would be liable to an action: *Grainger* v. *Hill* (*d*); but that is not this case: *Craig* v. *Hassell* (*e*).

(*a*) 2 B. & Ad. 696.
(*b*) 3 Q. B. 79.
(*c*) 16 M. & W. 200.
(*d*) 4 Bing., N. C., 212.

*A. Vance* and *R. Andrews*, for the plaintiff.

It is actionable, maliciously to make false representations to a Court of Justice, whereby that Court may put in force a process which may do injustice; and in actions of that nature it is not necessary to aver that the process which was so improvidently issued has been set aside. The foundation of the plaintiff's action is the deceit of the Court: *Baron* v. *Sleigh* (*a*). The process need not be shown to be set aside: *Dowdall* v. *Kelly* (*b*); *Steer* v. *Scoble* (*c*); *Ross* v. *Norman* (*d*); *Daniels* v. *Fielding* (*e*); *Jones* v. *Givin* (*f*). At any rate, the proceeding here is at an end, it has been executed and completed.—[GREENE, B. Being at an end means in the favour of the person bringing the action.]

PIGOT, C. B.

We do not think it necessary to call on the defendant's Counsel for any further discussion of this case. In the cases which have been cited to us, it was held that, in actions for the malicious prosecution of proceedings, where the particular proceeding complained of is the immediate result of the adjudication of a Court of competent jurisdiction, the pleading is bad, unless it shows that the proceeding is at an end. The cases which have been relied on by the Counsel for the plaintiff, on the other hand, are cases where the issuing of process is the act of the party; but in none of those cases where it is the immediate act of a Court of competent jurisdiction, exercising a judicial act, has the pleading been held good, unless it be shown in it that the proceeding is at an end, and done away with, and no longer a protection to the parties. Before the late Act of *Vic.*, proceedings in arrest were entirely *ex parte;* but, since that Act, it is necessary to obtain the adjudication of a Judge, for the purpose of making the arrest, and the result of that adjudication is the issuing of the process; and although it is held that the *gravamen* of an action in such a case is the deception on the Judge, yet in no case cited, while the process remains, has an action been sustained

(*a*) Cro. El. 628.
(*b*) 4 Ir. Com. Law Rep. 527, 535.
(*c*) Cro. Jac. 667.
(*d*) 5 Exch. 359.
(*e*) 16 M. & W. 200.
(*f*) Gilbert, 185.

H. T. 1858.
*Exchequer.*
MUNCE
*v.*
BLACK.

for the malicious issuing of it, by means of the deception of the Judge. In the present case, the things that have occurred are as follow:—A Court of competent jurisdiction, dealing with civil rights, is applied to upon an affidavit said to be false. On that, the Court adjudicates, and issues a process, and on that an injunction issues, which is executed, and is still in force. That is precisely analogous to the proceeding where a party issues a writ, the process-server makes a false statement as to its service, and the result is judgment by default. Execution thereupon issues against the defendant, and his goods are taken, and he brings an action. Can it be said that, the judgment remaining in force, and the process not set aside, he can do so? This Court here has been repeatedly applied to to set aside proceedings; but no attempt has been made to make it entertain an action for a malicious proceeding, whilst that proceeding is still in force. The case is one *primæ impressionis* to make a process, still remaining in force and effect, the subject of a suit for maliciously putting in force the action of the Court. The case has not terminated, and the plaint itself states that the proceedings were under the adjudication of a Court of competent jurisdiction; and a proceeding emanating from that, remaining unreversed, cannot be made the subject of an action. On these short grounds, we must allow this demurrer.

Judgment for defendant.

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## CONNOR *v.* CRONIN.

*(Sittings in Banco.)*

*Feb.* 4.

A stamped copy of a lost unstamped original document cannot be received in evidence.

*Bonsfield* v. *Godfrey* (5 Bing. 418), *Blair* v. *Ormond* (1 De G. & Sm. 428), and *Smith* v. *Henley* (1 Ph. 391), observed upon and distinguished, on the ground of fraud in the party objecting to such evidence.

Use and occupation.—Defence, a traverse, and issue accordingly.

At the trial before Mr. Justice Ball, at the county of Kerry Summer Assizes 1857, the plaintiff sought to prove an agreement in writing, under which the defendant held, containing the terms and

amount of the rent, the arrears of which were now sought to be recovered. It was proved that the original agreement executed by the parties had not been stamped, and was not forthcoming, having been deposited with one Mr. Day, who had taken it with him to France, where he was then resident. A copy of this agreement was then produced by the plaintiff, and tendered in evidence, together with the penalty and stamp-duty. The reception of this as secondary evidence of the original, or as a document which could be stamped and read, under the provisions of the Common Law Procedure Act, was objected to on the part of the defendant. The learned Judge admitted it in evidence, on lodgment with the Registrar of the amount of the penalty and stamp-duty; and a verdict was had for the plaintiff, and liberty was reserved for the defendant to move that a verdict should be entered for him, if the learned Judge was wrong in receiving the copy.

A conditional order to that effect having been obtained—

*Sullivan*, for the plaintiff, now appeared to show cause against same.

Under the schedule to the Stamp Act (55 *G.* 3, c. 184), which was extended to Ireland by the 5 & 6 *Vic.*, c. 82, the Commissioners have the same jurisdiction as to stamping a copy as the original: *Bousfield* v. *Godfrey* (*a*); *Blair* v. *Ormond* (*b*).

*Brereton* and *Leahy*, in support of the conditional order.

*Bousfield* v. *Godfrey* was a case of terms put upon a fraudulent party by the Court, in the exercise of its discretion. It was, no doubt, followed by the Vice-Chancellor in *Blair* v. *Ormond;* but he is reported to have said that, in doing so, he did not act upon his own opinion. *Smith* v. *Henley* (*c*) recognises the law that no parol evidence can be given of an unstamped agreement which has been destroyed; and Lord Lyndhurst's opinion there, as to the reception of a copy, is extra-judicial, as is observed in *Blair*

(*a*) 5 Bing. 418.

(*b*) 1 De G. & Sm. 428; S. C., 11 Eng. Jur. 665.

(*c*) 1 Ph. 391.

H. T. 1858.
*Exchequer.*
CONNOR
*v.*
CRONIN.

v. *Ormond.* In *Rankin* v. *Hamilton* (*a*), the Court rescinded an order restraining one of the parties in the possession of an unstamped original, who said it had been lost, from relying on it, and enabling the other party to give in evidence a stamped copy; and, in that case, *Bousfield* v. *Godfrey* met with some disapprobation. In none of those cases was the stamping of the copy under the provisions of the Stamp Act relied on. The copy need not have been stamped at all, if the original were stamped: *Braythwayte* v. *Hitchcock* (*b*); *Ditcher* v. *Kenrick* (*c*). The Common Law Procedure Act has not altered the law on this subject.

*Sullivan*, in reply.

This is a Revenue question, and, provided the object of the Stamp Laws is complied with, and the Revenue is not damnified, the Courts will go a great length in preventing such points being made. *Smith* v. *Henley* (*d*) rules this very point. Lord Lyndhurst says there:—"If there was in this case a copy of the agreement, "or if your witness could verify, from recollection, the precise "terms of the agreement on which you rely, so that you might "take them down in writing, and produce that writing at the "Stamp-office, I should be very glad to act upon the authority "of that case." *Rankin* v. *Hamilton* (*e*) is only a question as to whether the Court has jurisdiction to make an order precluding a party from raising the question; it is not in point here. *Paul* v. *Meek* (*f*).—[RICHARDS, B. There the document was a second original. It appears from that case that, if it had been offered as secondary evidence, it would not have been admitted. The payment of the stamp-duty on the copy cannot act so as to make it a substitute for the original.]—The original instrument is in evidence by means of the copy; it is therefore before the Court, and, being so, may be stamped.—[GREENE, B. The copy is only allowed as evidence of the original instrument, by reason of the absence of the latter.]—The provisions in the Common Law Procedure Act are

(*a*) 15 Q. B. 187.
(*b*) 10 M. & W. 494.
(*c*) 1 Car. & P. 161.
(*d*) *Ubi sup.*
(*e*) *Ubi sup.*
(*f*) 2 Y. & Jer. 116.

receive a liberal construction; they are remedial, and this is a case which requires a remedy. The word "document" must be construed liberally. *Lysaght* v. *Scully* (*a*) shows the extent to which the Courts are inclined to go in construing the words of remedial statutes. That was a case on the Apportionment Acts, and the words, "the person making such demise," were construed to include the assignee of the lessor.

PENNEFATHER, B.

This case has been extremely well argued, and the Court has received a great deal of assistance from the Counsel at each side; and indeed the question is not one unattended with difficulties. The facts which give rise to this question are the following:—An unstamped document of agreement was entered into between the plaintiff and the defendant, ascertaining, as it appears by the evidence, the amount of rent to be paid by the defendant, and which is the sum sought to be recovered in the present action for use and occupation. At the trial, it was insisted that a copy of that instrument might be given in evidence, the original being out of the power of the party, and not being in the country, having been deposited with one Mr. Day, who was then residing in France. A copy was then produced, and the penalty for stamping the original was deposited with the Registrar, and the copy was stamped afterwards. It was contended then that the objection to receiving this copy was done away with, that the Revenue had received as much as it had a right to receive; and the cases of *Bousfield* v. *Godfrey* and *Blair* v. *Ormond* were insisted on as authorities for the reception of this copy in evidence. It becomes necessary for us to consider then the authority of these two cases, and the other before Lord Lyndhurst (*Smith* v. *Henley*), and to consider also how far we are bound by those authorities, considering, at the same time, the course which was taken subsequently in the case of *Rankin* v. *Hamilton*. The proposition which has been stated is rather startling; it is, in effect, that an unstamped instrument should be given in evidence, because a copy is duly stamped; and it is argued that this case

(*a*) 6 Ir. Jur. 43.

H. T. 1858.
*Exchequer.*
CONNOR
*v.*
CRONIN.

is helped by the late Common Law Procedure Act, which allows a document to be stamped, on depositing the penalty with the Registrar. To consider the case, in the first place, on the last of these points, we are all very clearly of opinion that the case must be decided independently of the late statute; that the provisions of that statute are not intended to reach the case of a document not stamped, which might have been lost, but to enable the party producing the document to read it as if *it* had been stamped; but it never was the intention of the Legislature to interpose furthur, or to alter the rules of evidence, and say that, where an unstamped instrument has been lost, another document may be produced and stamped as the original. It still is an unstamped instrument. The case is one which the Legislature do not appear to have contemplated; nor does it appear that they intended to suffer another instrument to be stamped instead of that original. If they intended to remedy the case of a lost unstamped instrument, they would have said so, and would have provided that, on paying the penalty and stamp-duty, secondary evidence might be given of the lost instrument; but there is nothing in the Act of Parliament to lead us to suppose any such intention on the part of the Legislature. Therefore it is that we think that this case must be disposed of as if the Common Law Procedure Act had never been passed.

The main question then is this, whether the stamping of a copy gives validity to the original, and allows it, though unstamped, to be given in evidence? because, after all, the evidence is the original instrument, not the copy, which is only evidence of the original instrument. If the original be lost, and no copy has ever been taken of it, it is plain the party relying on it must suffer, and can have no redress. Then is it different because a copy happens to have been taken? On principle, I should say not; and that the fact of this being a copy cannot alter the rights of the parties with regard to the unstamped original. The authorities to which we have been referred deserve great consideration. The first case is that of *Bousfield* v. *Godfrey*. There an order was made by the Court of Common Pleas in England, restraining a party from

defeating the evidence of a stamped copy by the production of an unstamped original, and treating the stamped copy as evidence of an unstamped original. That order was made, as it appears, very much on account of the fraudulent conduct of the party raising the objection. It seems to have been the opinion of the Court that, on that account, the copy stamped should be treated as evidence. This case was followed by Vice-Chancellor Knight Bruce; and he unquestionably, on its authority alone, and against his own opinion, suffered a stamped copy of an unstamped instrument to be given in evidence. And again, Lord Lyndhurst, in the case before him (*Smith* v. *Henley*), not only recognises the authority of *Bousfield* v. *Godfrey*, but he goes further, and says, that even if the party could verify from recollection the precise terms of the agreement, so that it might be taken down in writing, he would be very glad to act upon the authority of that case.

Certainly that is going a great length, and we should wish to follow anything he has decided; but considering the whole matter, and that Judges, not only in England, but also in this country, speak of points not strictly before them, and sometimes say what is not to be considered as strictly laying down the law of the land, we do not think that point has been decided; and there is no decision nor *dictum* to be found supporting the words attributed there to him. Resting on an authority of this kind, it is pressed on us that we ought to follow that authority, even though it should not accord with our own judgment, as Vice-Chancellor Knight Bruce is said to have done. He is reported to have made his decree on the authority of *Bousfield* v. *Godfrey*, although it did not accord with his own view. Now it really would be very hard to say that stamping a copy can be considered equivalent to stamping the original. *Bousfield* v. *Godfrey* was brought before the Courts in subsequent cases, and especially in *Rankin* v. *Hamilton* (*a*). That case came before the Court on an application to rescind an order made by Mr. Justice Erle, restraining the opposite side from setting up the want of a stamp upon the

(*a*) 15 Q. B. 187.

H. T. 1858.
*Exchequer.*
CONNOR
v.
CRONIN.

original instrument, as an objection to the admissibility of the copy. It was a case of precisely the same nature as the case before us; and the Court, after much consideration, were of opinion that the Judge had not jurisdiction to make such an order; that so far as *Bousfield* v. *Godfrey* went to establish any such principle, it could not be maintained, and they set aside the order made by Erle, J., as being one which he had not authority to make. It is material to examine this case to consider how far *Bousfield* v. *Godfrey* is to be considered as law. It is unquestionably not to be considered as law, so far as it makes an order which would impinge upon the regular course of proceedings at Nisi Prius. So far as it would restrain a party from setting up a defence of requiring legal evidence, its authority is certainly shaken. Attending to these cases, it is very hard to say that *Bousfield* v. *Godfrey* can now be considered as a binding authority. Can we then say that the case before Vice-Chancellor Bruce is to have any weight, made against the leaning of his own mind? If we take away the foundation on which he rested his judgment, we must put that case out of view, and revert to our own opinion; and on the best consideration I can give this case, I think this copy ought not to be received; that its reception would be against principle, and not sanctioned by authority; and I therefore think this verdict must be set aside.

RICHARDS, B.

I entirely concur in the judgment of my Brother PENNEFATHER, and in the reasons on which it was founded; and it appears to me that *Bousfield* v. *Godfrey* was rested very much on the ground of fraud. I, however, am far from saying that if a case of gross fraud were made out to their satisfaction, it would be impossible for the Court to frame or shape an order to prevent the party availing himself of that. Therefore this is not to be considered as ruling any point of that nature; and *Bousfield* v. *Godfrey* was not rested on any rule as to evidence or Common Law, but upon the jurisdiction of the Court to make a special order, such as was made there.

GREENE, B.

I concur also in the judgment of my Brother PENNEFATHER, and would content myself with saying so, but for a few observations in the cases cited in argument, and which for some time created a doubt in my mind. The question here is, whether a copy of an unstamped original was properly received in evidence, by reason of its being itself stamped, and which copy would not otherwise have been receivable? It is quite settled that, if a contract be entered into by a lost instrument, upon which a stamp is required, and it appear that the original is unstamped, the party relying on it would be defeated, because he could not succeed by secondary evidence in establishing his case, when he could not do so if the original were forthcoming; that is established by *Blair* v. *Ormond*, and that class of cases. The question then here is, whether a stamp being affixed to the copy, the objection as to the want of a stamp on the original is removed? There is no foundation for saying that that meets the want of a stamp on the original; and the cases relied on on the part of the plaintiff here do not, I think, profess to interfere with the general principle which I have mentioned. *Bousfield* v. *Godfrey* proceeded upon the fraud of the party making the objection. So also, to a certain extent, did *Smith* v. *Henley*; and on that ground the Judge, whose order was afterwards decided to have been improvidently issued (in 15 *Q. B.*), restrained the parties from proceeding. When we look then from *Bousfield* v. *Godfrey*, we must remember that Vice-Chancellor Knight Bruce professed to act on the authority of that case, expressing that he would not of himself be inclined to that view; but it was contended here that the Vice-Chancellor went further, and that, putting fraud out of the question, he laid down this proposition, that in any case of a lost instrument, if a copy be produced and stamped, it would be receivable, and that he decided the broad principle that, wherever there is a loss of the original document, a stamped copy is receivable; but no such principle ever was intended to be laid down by him; for there the original instrument was deposited with the person whose representative the defendant was, and it was he who had lost it; and

H. T. 1858.
*Exchequer.*
CONNOR
*v.*
CRONIN.

the Vice-Chancellor says that "on the authority of the former "case (*Bousfield* v. *Godfrey*), with the sanction of Lord Lyndhurst's "recognition, and not upon his own opinion, he decided to receive "the draft if properly stamped." So now the observation on which stress is laid is this, that "if it would be right to admit a copy "in the case of fraud, the principle would seem to extend to "admitting a copy of an instrument lost by the party sought to "be charged;" that is to say, that the negligence of the party may be such as to amount to fraud, so far as to enable his antagonist to rely on a stamped copy of an unstamped original. Here it is not so; and therefore I do not conceive this *dictum* of the Vice-Chancellor was intended to lay down the broad principle that, in every case of a lost unstamped original, a stamped copy would be admissible.

## HANKS *v.* CRIBBIN and others.

*(Common Pleas.)*

*April* 28, 29.

A millrace had been made about forty years before the present action, leading to the mill of the plaintiff, from an ancient watercourse through which the mill had been previously supplied. The lands through which the cut was made had been demised under freehold leases, by the owner of the inheritance, in 1746, and again, by his representative, in 1796, to the same person, in pursuance of a covenant for renewal in the former lease. The lessee died in 1841, and in 1843 a lease of the lands in question was made for twenty-one years to the defendant, by the heir-at-law of the lessor in the lease of 1796. At the time of the making of the new cut, the lands were in the occupation of a sub-tenant, under the lease of 1796, to whose possession the defendant succeeded. The water had flowed continuously in the new cut, from the time of its being made, up to the time of the interference of the defendant; but within the preceding six years an artificial dam, made for supplying the new cut, had been frequently removed by the occupying tenants. —*Held* (in an action for diverting the water in the new cut, the issue in which was, whether it was wrongfully flowing in that cut), that the question to be left to the jury upon these facts was, whether these acts (viz., the making of the new cut), were done with the knowledge and assent of the owner in fee; and, if so, whether it was such knowledge and assent as that a grant by deed might be presumed?

*Held also*, that the presumption of such a grant was necessary, in order to entitle the plaintiff to a verdict.

*Held also*, that there was evidence to go to the jury, of such knowledge and assent on the part of the inheritor.

A party objecting to a Judge's charge must state specifically the question which he requires the Judge to leave to the jury.

This was an action brought by the plaintiff, who was a mill-owner, against the defendants, for diverting the supply of water from his mill.

The defendant Peter Cribbin, upon whose defence the question before the Court was raised, pleaded that the stream in the summons and plaint mentioned had been wrongfully brought through his land in a new channel, different from that in which it had originally flowed, by means of a cut leading from the old channel, above the place where the act complained of had been done by the defendants; and that from an accumulation of gravel and weeds in the original channel, the water had been wrongfully continued in the new cut, and had thereby flooded and injured the defendant's lands, who did therefore sink the original channel of the stream, for the purpose of preventing such injury. He also pleaded that the old stream was an ancient watercourse, which ought of right to flow at a certain level; but that from an accumulation of mud, gravel and weeds, its level had been raised, and that the water flowed over the defendant's lands, thereby injuring them; to prevent

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.

the continuance of which, the defendant had sunk the bed of the ancient stream to its original depth. The issue material to the present case was, whether the water in the new channel mentioned in the defence was wrongfully flowing through the defendant's land at the time of the committing of the alleged grievances? This case came on for trial before the CHIEF JUSTICE of the Court of Common Pleas, at the Nisi Prius Sittings after last Michaelmas Term; and the fact that the defendants had sunk the bed of the old channel, below the place where the new cut had been made, and thereby diminished the volume of water in the latter channel, having been proved, the defendant Cribbin, in support of the affirmative upon the above issue, read in evidence an indenture of lease of the 13th of June 1746, whereby James Earl of Kildare did demise to one Paul Steele the lands now in the occupation of the defendant Peter Cribbin (and through which the new cut had been made), for the lives of Paul, William and John Steele, and the survivor of them, with a covenant for a new lease of one life upon the expiration of the lease then granted. Another lease was also given in evidence, bearing date the 3rd of June 1796, and made between William Robert Duke of Leinster and Robert Steele, whereby, after a recital that the three *cestui que vies* in the lease of 1746 were dead, the lands in question were demised to Robert Steele for his own life. Robert Steele died in the year 1841, up to which time the rents had been received by one James Moody, an agent of the lessees, from the occupying tenants, out of which he paid the rent reserved in the above leases, until the expiration of the last of them, upon the death of Robert Steele in 1841.

The defendants also read in evidence a lease of the 15th of February 1843, whereby Augustus Frederick Duke of Leinster (the eldest son and heir-at-law of William Robert Duke of Leinster, the lessor in the lease of 1796) demised the lands in question to Peter Cribbin the defendant, for the term of twenty-one years. It was proved that, at the time when the new cut was made (which took place about forty years before the present action), and for some time previously, the lands demised to the defendant had been in the occupation of one Michael Callan (who held as undertenant to

Robert Steele, lessee in the lease of 1796), whom the defendant succeeded in the occupation of the lands in question. It was also proved that, before the making of the new cut, the water supplying the plaintiff's mill had flowed through the old cut; but that, from the time that the new cut had been made, the water had continuously and without interruption supplied the mill through the latter channel, until the diversion of it by the defendant; and that there had been an artificial bank or weir immediately below the commencement of the new cut, made within the preceding six years, which had been frequently removed by the tenants of the lands, and replaced by the plaintiff.

At the close of the trial, his Lordship told the jury that if, at the time of the making of the new cut, about forty years before the present action, the Duke of Leinster, the then lessor of the lands, under the lease of 1796, was aware of, and acquiesced in, that act, that in such case the water was rightfully flowing through the defendant's land at the time of the diversion of it by him, and that under such circumstances they should find for the plaintiff; but if they believed that the new cut was made without the acquiescence or concurrence of the then Duke of Leinster, that they should find a verdict for the defendants.

To this charge, the defendants' Counsel excepted, upon the grounds that there was no evidence that the new cut had been made with the concurrence or acquiescence of the Duke of Leinster, the then landlord; and also that, whether the new cut had or had not been made with his concurrence or assent, as lessor in the lease of 1796, was immaterial, as regarded the rights of the defendant Peter Cribbin in this action; but that, on the contrary, if the water was rightfully flowing in the new cut, immediately before and at the time of the diversion of it by the defendant, the latter was entitled to a verdict; and that, according to the evidence, the water had been wrongfully flowing through the defendant's land at that time; also that, even if the jury believed that when the new cut was made, about forty years ago, it was made with the assent, acquiescence and concurrence of the then lessor, yet that such assent, acquiescence and concurrence did not

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.

confer a right upon the plaintiff, or any other person, to continue such stream of water through the defendant's lands against his will; and that, therefore, the water was wrongfully flowing in the new cut at the time of its diversion by the defendant. But his Lordship refused to make any alteration in his charge as originally made; whereupon the defendant's Counsel tendered a bill of exceptions.

*Owen*, in support of the exceptions.

This being an easement, and therefore an incorporeal right, and standing upon the same footing as rights of common, rents, &c., does not lie in livery, but in grant; and an interest in such property cannot be created, except by deed: *Shelford's Real Prop. Stat.*, pp. 49, 51; *Yard* v. *Ford* (*a*). Uninterrupted possession only establishes a *prima facie* title, and a jury cannot find in favour of the person in possession, unless they believe that a conveyance was actually executed: *Doe* d. *Fenwick* v. *Read* (*b*). This rule is subject to a qualification, where the possession went with the acquiescence of the owner of the inheritance; but there was no such acquiescence proved at the trial in this case: *Daniel* v. *North* (*c*); *Regina* v. *Bliss* (*d*). User for ninety-nine years during a tenancy will not establish a right, unless there be distinct evidence of acquiescence by the landlord: *Wood* v. *Veal* (*e*). *Davies* v. *Stephens* (*f*) will be cited *contra*, but that was only a Nisi Prius decision, and it was a case in which it was easy to give evidence of an user. In *Gray* v. *Bond* (*g*), the user could not have existed without the knowledge of the owner of the inheritance, and it is, therefore, distinguishable from this case; for express notice to the owner in fee is necessary: *Rex* v. *Barr* (*h*).—[MONAHAN, C. J. Or to his agent.]—In this case there was no direct evidence of

(*a*) 2 Wms. Saund., *note* 2.
(*b*) 5 B. & Al. 232.
(*c*) 11 E. 370.
(*d*) 7 Ad. & Ell. 550.
(*e*) 5 B. & Al. 454; S. C., 1 Dowl. & Ryl. 20.
(*f*) 7 Car. & Pay. 570.
(*g*) 5 Moo. 527; S. C., 2 Bro. & Bing. 667.
(*h*) 4 Camp. 16.

personal knowledge of the fact by the landlord; and the rent was not paid to him by the tenant in occupation, but by a middleman.

*F. Johnson* (with him *J. E. Walsh*), contra.

A right to flowing water may be acquired by prescription alone: *Hillary* v. *Waller* (*a*); *Shelford's Real Prop. Stat.*, p. 49, citing *Cowp.*, p. 110. Such a title may be acquired where the owner in fee continues in possession of the lands on which the easement exists: *Howard* v. *Wright* (*b*); *Bulston* v. *Bensted* (*c*); *Mason* v. *Hill* (*d*). If the owner in fee be not in possession, then the question of his concurrence is a proper inquiry for a jury: *Davis* v. *Stephens* (*e*); *Tucker* v. *Newman* (*f*).—[MONAHAN, C. J. No doubt, the landlord had a cause of action during that period; but is there any case deciding that the fact of his not having brought an action raises a presumption of acquiescence on his part?]—Such a presumption is to be raised, just as much as if he was in possession, on account of the injury to his reversion: *Gray* v. *Bond* (*g*). The plaintiff was entitled to an absolute direction to that effect: *Cross* v. *Lewis* (*h*); *Harper* v. *Charlesworth* (*i*); *Rex* v. *Barr* (*k*); *Finch* v. *Resbridger* (*l*). *Wood* v. *Veal* is distinguishable.

It is not sufficient that a party at the trial, objecting to the Judge's charge, should merely ask for a direction in his favour; he must state specifically the question which he requires the Judge to leave to the jury, otherwise the opposite party is entitled to retain his verdict: *Bain* v. *The Whitehaven & Furness Railway Co.* (*m*).—They also referred to *Mathews on Presumption*, pp. 15, 310.

*Lawson*, in reply.

*Cur. ad. vult.*

(*a*) 12 Ves. 266.
(*b*) 1 Sim. & Stu. 190.
(*c*) 1 Camp. 463.
(*d*) 5 B. & Ad. 1.
(*e*) 7 Car. & Pay. 570.
(*f*) 11 Ad. & Ell. 40.
(*g*) *Supra.*
(*h*) 2 B. & Cr. 686.
(*i*) 4 B. & Cr. 574.
(*k*) *Supra.*
(*l*) 2 Ver. 396.
(*m*) 3 H. Lds. 16.

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.
*May* 8.

MONAHAN, C. J.

This case comes before the Court upon a bill of exceptions. The action was brought by the plaintiff against three defendants, for diverting his watercourse; and they have all pleaded traversing the disturbance or diversion; and one of them, the defendant Cribbin, has also pleaded a special defence, and he says, that a new cut had been wrongfully made, taking the water from its ancient course, over and through his lands; and that at the time in question, the water was wrongfully flowing through his lands, through the new cut, and that he did the acts complained of for the purpose of restoring the water to its ancient course and prevent its flowing through his land. On this defence the only issue taken was, whether, at the time in question, the water was wrongfully flowing through the defendant's lands? impliedly admitting that if it was wrongfully flowing through the new cut, through the defendant's lands, the acts complained of were justified. The plaintiff's case at the trial was this; that for forty years, or thereabouts, his mill had been supplied from the ancient river, through the cut flowing through the defendant's lands. It did not originally flow through this modern cut, but along a mearing, and separated the defendant's lands, the estate of the Duke of Leinster, from the lands of an adjoining proprietor. About forty years ago the present cut was made through the lands now in possession of the defendant, with, or at any rate not against, the consent of the then occupying tenants; and the case of the plaintiff was that, in point of fact, he had enjoyed a forty years' user, and therefore, that the stream was rightfully flowing through the present channel, and that, therefore, the defendant should not have disturbed it. In order to defeat this *prima facie* case, the defendant went into evidence to show that, for several years before this period of forty years, the lands alongside of which the stream then flowed had been held under a lease from the then Earl of Kildare, executed in the year 1746; that this lease expired, and that another was granted in the year 1796, by force of a covenant for renewal in the former, to one Robert Steele, for his life, and that the latter lease subsisted until the year

1841; that the lease to the defendant was made two years after the expiration of the latter lease; also, that in point of fact this new watercourse had been made before the lease of 1796 had expired; and therefore, the question submitted upon the part of the defendant was this:—inasmuch as at the time of the diversion of this water from its ancient course, this property of the Duke of Leinster was held under a freehold lease, that this diversion was not binding upon the Duke, or on the defendant his tenant. Upon the other hand, it was contended that this user having subsisted for forty years, I should have directed the jury, that it bound both tenants and landlord, and that the stream was rightfully flowing in the new cut. Upon the authority of a case in *Carrington & Payne*, cited at the trial, I left to the jury these questions:—Whether or not the new cut was made with the knowledge and acquiescence of the Duke of Leinster, the then proprietor? informing them that, if so, the stream had been rightfully flowing through the present cut; but, if the cut had been made without the knowledge and concurrence of the Duke of Leinster, that the stream was wrongfully flowing in that course: and no question being raised upon the pleadings as to the propriety of the act done, but merely as to the wrongful flowing of the water, the case went to the jury upon this issue, and they found that the stream had been rightfully flowing in the new cut, or, in other words, that the latter had been made with the assent and knowledge of the Duke of Leinster, the then owner in fee. Three exceptions were taken to this direction; first, that I should have told the jury that there was no evidence of knowledge or concurrence on the part of the owner in fee, at the time of the making of the new cut; secondly, that even if it were so, such knowledge and concurrence was immaterial as to the rights of the plaintiff; and the third exception was to the same effect. Having heard the case fully discussed, we were all of opinion that the question which I left to the jury was not, strictly speaking, the only question that I should have left to them; for, upon the authorities, we think that the question left to them should have been, whether these acts were done with the knowledge and

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.

assent of the owner in fee; and if so, whether it was such knowledge and assent as that a grant might be presumed to have been made by deed? and that such a presumption of a grant was necessary to entitle the plaintiff to a verdict. It has been contended on the other side, that no such questions were raised at the trial; and we have now to consider whether, upon the exceptions as they stand, this question is open to the defendant? Upon the authorities, and particularly the case of *Bain* v. *The Whitehaven and Furness Railway Co.* (*a*), we have reluctantly arrived at the conclusion, that none of the exceptions raise the question as to a grant being necessary to confer the right; at the same time, it is probable that the defendant has sustained no substantial injury by this omission, as, if the jury were justified in coming to the conclusion that the new cut was made with the knowledge and acquiescence of the Duke, they would have gone a step further, and presumed a grant by deed: at the same time, with respect to the exception alleging that the acquiescence of the Duke was immaterial, it cannot be sustained; as, no doubt, his assent was material, as his assent would be evidence to be submitted to the jury of a grant. The only question on these exceptions is, whether there was any evidence of assent and acquiescence on the part of the Duke of Leinster? He appears to have been owner in fee at the time of the making of this new cut. Steele was tenant of the lands, but he was not in actual occupation, there being undertenants from whom he received a profit-rent, through his agent Moody. The latter, after paying the head-rent to the Duke of Leinster, handed the balance to Mr. Steele. Matters continued in this state until the year 1841, when the lease to Steele expired. There is no evidence of what became of the land during the following two years; but after that time, in the year 1843, a new lease was executed, for a term of years still subsisting, to the defendant Peter Cribbin, during the continuance of which the acts were done of which the plaintiff now complains. There is no evidence of any act of dissent, from the commencement of the defendant's interest up to

(*a*) 3 House of Lords, 1.

the time when the acts were done, questioning the right of the plaintiff to have his mill supplied through the new cut, which had been made about forty years before; and the effect of which was to dry up the water in the old cut, and which in consequence became choked with weeds and gravel. Now the only question is, whether I should have told the jury that there was no question of fact upon this part of the case? for we are not considering the propriety of their finding; but the sole question now before us upon this bill of exceptions is, whether the case was so totally devoid of any evidence of knowledge and assent on the part of the Duke of Leinster, that I should have withdrawn this question altogether from the jury? Upon full consideration, we, or at least the majority of the Court, are of opinion that there was some evidence of this fact; and it consisted in the following matters: the length of time since the act was done, and, not only that, but the nature as well of the act as of the thing itself, which were both of a public character. A watercourse is cut in a place open to the observation of everyone, creating an alteration in the course of a stream from an ancient mearing, to very near the centre of a farm; it supplies a mill at a considerable distance, and has the effect of choking up the channel which formed the old mearing. It also appears that in the meantime there was a change of tenancy: and the presumption is, that persons will look after their own, it being their interest and duty so to do. No evidence in fact was given as to the place of residence of the Duke of Leinster at this time, nor as to who was his agent, in reference to this property. But, considering the facts that I have just alluded to, and these facts being before the jury, I do not consider that I should have been justified in withholding this question from the jury. From the authorities that have been referred to, I draw the same conclusion. The case of *Daniel* v. *North* (*a*) has been cited as an authority to show that mere length of time is not evidence of assent; but I draw no such conclusion from that case. The observations of Lord Ellenborough in that case were relied upon as showing that length of enjoyment was no evidence as

(*a*) 11 E. 392.

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.

against the landlord; but I conceive that what was decided in that case was this, that there was no case for a direction to the jury as to how they were to find, but not that there was no evidence of the fact of assent. *Wood* v. *Veal* (*a*) has been also relied upon, for the same purpose. That was a question as to a right of way; and it appears that the beginning of the user was after the making of a lease of the lands. The Judge at the trial did not direct the jury one way or the other, but left to them the question, whether there had been an assent by the landlord since the execution of the lease? and the jury found that there was no such assent on the part of the owner in fee. That cannot therefore be a decision that mere length of time is no evidence of assent. *Davis* v. *Stephens* (*b*) is a strong case upon this subject; it is only a Nisi Prius decision, to be sure; but it was tried before a very able Judge, Lord Denman. The defendant in that case relied upon a right of user, which had only subsisted during the occupation of tenants; and Lord Denman, in summing up, says:— "All the acts of user seem to have taken place during the occupation of tenants; and their submitting to them cannot bind the owner of the land, without proof of his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them." No express knowledge of the act or assent of the landlord was proved in that case. Why then should it be presumed that he had been aware of the fact? Because the *locus in quo* was his property, and any person acting for him must have seen what was done, and informed him of it; for it was not necessary that he should see it with his own eyes. It would appear, from Lord Denman's concluding observations, that he was of opinion that no right of way existed; but the jury were of a different opinion, and found for the defendant. So in the present case, although I might have formed a particular opinion, it would nevertheless have been altogether a question for the jury. In *Gray* v. *Bond* (*c*), it was held that length of time and public user were circumstances sufficient to found

(*a*) 5 B. & Al. 454. (*b*) 7 C. P. 570.
(*c*) 2 Brod. & Bing. 667.

E. T. 1857.
*Common Pleas.*
HANKS
*v.*
CRIBBIN.

the presumption of a grant by some former owner of the land. I am aware that there is a distinction between rights of way used by the public, and cases of this nature, where an individual claims a right; but I conceive that it is only a difference of degree, and not of principle; and, in the latter class of cases, it may be that a jury would require more lengthened evidence of user than in the former; still I am of opinion that such matters of fact are proper evidence from which a jury may presume acquiescence. For these reasons, the Court is of opinion that the exceptions should be overruled.

Exceptions overruled.

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## In re O'DONOHUE'S ESTATE.

T. T. 1857.
*June* 10.

A testator bequeathed certain leasehold lands, in the following words:—"I order and bequeath the rest, residue and remainder of my whole property in, &c., to my only child M., and to her heirs; but, in case of no heirs or issue, I give and bequeath the remainder thereof, after her decease, to the eldest son of my sister M."—*Held*, that the bequest to the testator's child M. created an absolute estate, subject to an executory devise over, in case of her leaving no issue, the words "after her decease" meaning *immediately upon* her decease.

THIS was a special case, submitted by the Commissioners of the Incumbered Estates Court to the Court of Common Pleas, for their opinion upon the following facts:—In the year 1817, Hugh O'Donnell, the testator hereafter mentioned, was possessed of the lands of of Tarmoncarra and Glendad, in the county of Mayo, for terms of years still subsisting; and, being so possessed, he made his will, on the 30th of November in that year; and, after directing payment of his debts and funeral expenses, he ordered and bequeathed the rest, residue and remainder of his whole property in the lands of Tarmoncarra, Glendad and Creevesmore, to his only child Matilda O'Donnell (called also Matilda Anne), and to her heirs; but, in case of no heirs or issue, he gave and bequeathed the remainder thereof, after her decease, to the eldest son of his sister Matilda and Arthur Hutchins, of Ardnagashel, in the county of Cork; but, in case of no male issue in that family, to the eldest son of Mary O'Donnell and William Ivers; but, in case of no male issue of

T. T. 1857.
*Common Pleas.*
*In re*
O'DONOHUE.

either family, to the eldest daughter or daughters of Matilda O'Donnell and Arthur Hutchins, to revert, in case of no issue, to the daughters of Mary O'Donnell and William Ivers; but that, in case his property in those lands should be sold by execution for his debts, in such case, he bequeathed £600 to his daughter Matilda. The above devise was in the following words:—"Fourthly, I order and "bequeath the rest, residue and remainder of my whole property in "Tarmoncarra and Glendad, being East Tarmoncarra and East "Glendad, and Creevesmore, to my only child Matilda O'Donnell, "and to her heirs; but, in case of no heirs or issue, I give and "bequeath the remainder thereof, after her decease, to the eldest "son of my sister Matilda and Arthur Hutchins, of Ardnagashel "in the county of Cork; but, in case of no such issue in that family, "to the eldest son of Mary O'Donnell and William Ivers," &c.

The testator died in the year 1818. Matilda O'Donnell, the testator's daughter, after his decease entered into possession of the lands in question; and, having become insolvent, died in the year 1855, unmarried and without issue; and a petition was presented by a judgment creditor of Matilda O'Donnell, during her lifetime, to sell her estate; and a claim to the estate was set up by Thomas Hutchins, who was, at the date of the will, and still is, the eldest son of Matilda, the testator's sister, and Arthur Hutchins, mentioned in the will. The question submitted for the opinion of the Court was, whether Thomas Hutchins, in the events that had occurred, took any and what estate in these lands, under the will of Hugh O'Donnell?

*Sullivan*, for T. Hutchins.

The words "after her decease," in the will of Hugh O'Donnell, must be regarded as meaning "upon or immediately upon the event of her decease," and not "at any subsequent time;" such a construction has been given to these words: *Wilkinson* v. *South* (*a*); *Trotter* v. *Oswald* (*b*); *Ex parte* v. *Davies* (*c*); *Johnson* v. *Johnson* (*d*). The latter case is a strong authority, the subject-matter of

(*a*) 7 T. R. 555.
(*b*) 1 Cox, Ch. C., 317.
(*c*) 2 Sim., N. S., 114.
(*d*) 8 Exch. 81.

the devise being real estate, inasmuch as Courts of Law always desire in such cases to construe that as a remainder in favour of the heir-at-law, which, in case of personalty, would only be an executory devise: *Parker* v. *Birks* (*a*). This rule of construction will fully account for the decision in *Broadhurst* v. *Morris* (*b*). The words "heirs or issue" in a devise mean heirs of the body: *Peake* v. *Pegden* (*c*).

*Beytagh* and *D. Sherlock*, for the creditors of Matilda O'Donnell. If this had been a devise of freehold estate, there can be no question but that Matilda O'Donnell would have taken an estate tail at least; and, such being the case, she should take an absolute estate in the chattel interest: *Broadhurst* v. *Morris; Doe* d. *Ellis* v. *Ellis* (*d*); *Jones* v. *Ryan* (*e*). The only question as to the applicability of this principle is in the case of personal estate: *Forth* v. *Chapman* (*f*); but, in order to give the words in question the meaning contended for by the other side, there must appear in the will some additional clause or circumstance relative to the testator or devisee, indicating such an intention: *Fearn. Cont. Rem.*, p. 485; *Lewis on Perpetuities*, p. 321. *Wilkinson* v. *South* is distinguishable, the bequest there having been made to another person, then living, *by name*, whereas, in the present case, the bequest over is "to the eldest son of," &c. This distinction is upheld in *Roe* v. *Jeffery* (*g*), *Trafford* v. *Boehm* (*h*) and *Doe* d. *Cadogan* v. *Ewart* (*i*). The case of *Wilkinson* v. *South* also contains the word "then," which limits the period of the demise. They also cited *Green* v. *Harvey* (*k*); *Pinbury* v. *Elkin* (*l*); *Dunk* v. *Fenner* (*m*); *Campbell* v. *Harding* (*n*), confirmed in the House of

(*a*) 1 K. & J. 156.
(*b*) 2 B. & Ad. 1.
(*c*) 2 T. R. 720.
(*d*) 9 East, 382.
(*e*) 9 Ir. Eq. Rep. 249.
(*f*) 1 P. Wms. 663.
(*g*) 7 T. R. 389.
(*h*) 3 Atk. 449.
(*i*) 7 Ad. & Ell. 660.
(*k*) 1 Hare, 428.
(*l*) 1 P. Wms. 563.
(*m*) 2 Russ. & Myl. 557.
(*n*) 2 Russ. & Myl. 411.

T. T. 1857.
Common Pleas.
*In re* O'DONOHUE.

Lords (*a*); *Donn* v. *Penny* (*b*); *Garratt* v. *Cockerell* (*c*); *Jee* v. *Audley* (*d*); *Doe* d. *Cork* v. *Cooper* (*e*); *Walter* v. *Drew* (*f*).

*Deasy*, in reply, cited *Paine* v. *Stratton* (*g*); *Doe* d. *King* v. *Frost* (*h*).

*Cur. ad. vult.*

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MONAHAN, C. J.

M. T. 1857.
*Nov.* 25.

This case has been submitted by the Commissioners of the Incumbered Estates Court for the opinion of this Court, upon the construction of the will of the father of Matilda O'Donnell. It was very fully argued last Term, and, during the argument, we intimated what our decision upon this question would be; nevertheless, we have thought it right to state more fully the reasons upon which that decision is grounded. It appears that Hugh O'Donnell, the testator, was, previous to the making of his will, and at the time of his death, possessed of certain lands for a term of years still subsisting; and that, at the time he made his will, he had an only daughter, Matilda O'Donnell, and also a nephew, Thomas Hutchins, who is now, and was, at the time of the making of the testator's will, the eldest son of Matilda and Arthur Hutchins; and he claims the devised estate, saying that it is not liable to the debts of Matilda O'Donnell, the testator's daughter. It appears that the testator died in the year 1818, and his daughter, having entered into possession of the devised estates, became insolvent, and died in the year 1855, without issue; and, during her lifetime, a petition had been presented in the Incumbered Estates Court, by one of her creditors, to sell her estate, of which her assignee under the Insolvent Act, Anthony O'Donohue, is now the representative: but a claim to the estate has been set up by Thomas Hutchins, under the will of his uncle. The Commissioners of the Incumbered Estates

(*a*) 8 Bli., N. S., 469.
(*b*) 19 Ves. 545; S. C., 1 Mer. 20.
(*c*) 1 Y. & C., C. C., 494.
(*d*) 1 Cox, Ch. C., 424.
(*e*) 1 East, 229.
(*f*) Com. Rep. 372.
(*g*) 2 Atk. 647.
(*h*) 3 B. & Ald. 546.

Court have stated these facts more fully upon their special case, and now seek our opinion as to whether, under these circumstances, and upon the true construction of the will of Hugh O'Donnell, Thomas Hutchins is entitled to any or what estate in the devised lands? No argument has arisen as to what estate he should take; and therefore the sole question for our consideration is, whether he is entitled to any estate in these lands, or whether, upon the death of the insolvent, the property went to her assignee? The will of Hugh O'Donnell, after stating that the testator was possessed of this estate for a term of years, and making provision for payment of debts, &c., proceeds as follows:—"I order and bequeath the rest, "residue and remainder of my whole property in Tarmoncarra and "Glendad, being East Tarmoncarra and East Glendad and Crewes-"more, to my only child Matilda O'Donnell and to her heirs; but "in case of no heirs or issue, I give and bequeath the remainder "thereof, after her decease, to the eldest son of my sister Matilda "and Arthur Hutchins, of Ardnagashel in the county of Cork." The question arising upon this devise is, what estate did Matilda O'Donnell take under the testator's will? The authorities bearing upon the subject have been very fully discussed at the argument of the case; and, upon Mr. Hutchins' part, this proposition has been urged, and we think satisfactorily, that Matilda O'Donnell took an absolute estate under the will, but subject to an executory devise over, in case of the leaving no issue. The words are "to her and her heirs, but, in case of no heirs or issue after her decease," to go over to Thomas Hutchins. The chief question in the case is, what is the meaning of the words "after her decease?" If these words meant after failure of issue, whenever that might occur, at some indefinite period, no doubt, the devise over would be void for remoteness; but if the meaning of the language of the testator be that the estate was to go over to Thomas Hutchins, if at all, immediately upon the decease of Matilda O'Donnell, then there can be no doubt but that the devise is within the limits of the law of perpetuities, and that the property must go to the party named in remainder.

A very early authority, but one very much in point, has been

M. T. 1857.
*Common Pleas.*
*In re*
O'DONOHUE.

referred to. That case is *Pinbury* v. *Elkin* (*a*), in which the testator, having bequeathed chattel property to his wife, made a bequest over in the following terms:—*if she shall die without issue, then after her decease*, the property to go to the testator's brother; and it was held that the bequest over in that case was effectual, upon the ground that the words "then after her decease" meant "immediately upon her death." The only distinction between that case and the present one is, that the word "then" does not occur in this devise, the words of which are "in case of no heirs or issue, I will and bequeath, after her decease," &c.; but we are of opinion that the omission of the word "then" can make no difference in the construction of the will. We take the same view of the effect of that word as Lord Brougham did in the case of *Campbell* v. *Harding* (*b*), and consider that in such a case it is to be regarded as denoting inference rather than time.—[His Lordship read Lord Brougham's judgment, p. 411].—The contingency upon which this property depended in the present case was, the death of Matilda O'Donnell without issue. To the same effect is the case of *Wilkinson* v. *South* (*c*), in which the testator bequeathed a leasehold property to his wife, for her life, and after her decease to his son, and the heirs of his body lawfully begotten, and to their heirs and assigns for ever; "but in default of such issue, then, after his decease," to the testator's grandson T. Wilkinson; and it was held that the devise over was within the proper limits. The next case to which I shall refer is *Trotter* v. *Oswald* (*d*), in which the devise was as follows:—"For the use of John Boyle during his life, and "to the lawful heirs of his body after his demise; *but in case of his "dying without issue of his body, after his decease*, I give all "such residue to John Oswald;" and it was held that the devise over to John Oswald was sufficient. I need not make any observations upon the latter case, except this, that we think it is impossible to distinguish it from the case now before the Court. There is another decision to which I shall refer, as being even a stronger case than *Trotter* v. *Oswald*, inasmuch as the devise

(*a*) 1 P. Wms. 563.
(*b*) 2 Russ. & Myl. 411.
(*c*) 7 T. R. 557.
(*d*) 1 Cox, Ch. Cas., 317.

was of lands in fee-simple, the case of *Ex parte Davies* (*a*). The words of the will in that case provided that in case the testator's son Matthew *should die without leaving any lawful issue of his body*, such part of his residuary estate so given to him as might be in the nature of freehold should, *at his death*, be divided, &c.; and it was held that this referred to a failure of issue at the time of his death. We have been referred by Mr. *Beytagh* to a case, *Broadhurst* v. *Morris* (*b*), in which the words of the testator were to the same effect as those in the present case, as a conflicting authority; but in that case the Court only decided that the devisee took an estate tail in the property, which was quite right, though the limitation over was to take effect only on a particular contingent determination of that estate tail. We are therefore of opinion that this case cannot be distinguished from the others to which I have referred; and we think that this is no time to criticise the meaning of words which, in their common sense interpretation, denote a failure of issue at a particular time, the more especially as the Legislature has by a recent statute limited to a certain period words of a similar kind; and therefore we are of opinion that such expressions as we are now dealing with should not bear a more extended sense, unless there appear to have been a clear and express intention to the contrary. For these reasons, we are of opinion that the property in question belongs to Mr. Hutchins, and our certificate to the Commissioners of the Incumbered Estates Court shall be to that effect.

(*a*) 2 Sim., N. S., 114.

(*b*) 2 B. & Ad. 1.

E. T. 1858.
*Queen's Bench.*

## CRAIG v. MURTA

*(Queen's Bench.*

*April* 23.

In replevin, a replication, being in the nature of a defence, a motion to reply double matter need not be on notice.—Vide *Doe* v. *Doe* (*ante*, p. 323.)

REPLEVIN.—Defence, common avowry fo

*Coates* applied for liberty to reply do arrear; secondly, a distress previously m

The officer of the Court objected, tha should be on notice.

*Coates.*

This, though called a replication, being is analogous to a defence in an ordinar party in replevin being the defendant, though not so in form, and therefore

* *Coram* O'BRIEN,

## COOKE v. LEVE

*April* 29.

An application to plead double matter, granted under special circumstances, without an affidavit of the truth of the matters sought to be pleaded.

THIS was an action against the defenda for negligence in not selling, according certain iron transmitted to them by the pleaded several defences, traversing the

* *Coram* O'BRIEN, *J.*

E. T. 1858.
*Queen's Bench.*
COOKE
*v.*
LEVEY.

gence, and alleging that they sold the iron to the best advantage.

*Exham* applied for liberty to plead double matter, without an affidavit of the truth of the matters sought to be pleaded. It appeared by the adffidavit of the defendants' attorney, that the defendants lived in Quebec, so that it would be difficult, and would cause great delay, to obtain the usual affidavit.

O'Brien, J., after consulting with the officer, granted the application; considering that, under section 57 of the Common Law Procedure Act, 1853, an affidavit of the truth of the matters sought to be pleaded was only necessary, if required by the Judge.

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## THE QUEEN *v.* The Rev. PETER CONWAY.*

H. T. 1858.
*Jan.* 18, 19, 20, 23.

Where it appears clearly by the affidavits, that a fair and impartial trial cannot be had in the county in which the offence charged in the information has been committed, the Court has jurisdiction to change the place of trial from that county to any other county which it may consider to be convenient and proper, and whereby the ends of justice, not only as regards the Crown, but also as regards the defendant, may be more effectually attained, and will permit a suggestion to be entered on the record for that purpose.

This was a motion that the *Attorney-General* may be at liberty to enter a suggestion upon the record, that a fair and impartial trial of the issue joined in this prosecution cannot be had by a jury of the county of Mayo, and that it is convenient that said issue be tried by a jury of the county of Dublin, or such other county as to the Court shall seem fit; and that, thereupon, the Court may award and direct that the trial of the issue joined in this cause may be had before a jury of the county of Dublin, or such other county as the Court shall be pleased to direct; or for such other order as the Court shall be pleased to make.

It appeared by the affidavit of Isidore Burke, Crown Solicitor for the county of Mayo, and several other affidavits on the part

* *Coram* Lefroy, C. J., Crampton and Perrin, JJ.

H. T. 1858.
*Queen's Bench*

THE QUEEN
*v.*
CONWAY.

of the prosecution, that an election was held in the county of Mayo on the 6th of April 1857, to return two Members to serve in Parliament for the said county, and that there were three candidates proposed on that occasion, viz., R. W. Palmer, G. H. Moore, and G. G. O. Higgins, of whom the two former were elected. That long previous to the said election, great political excitement existed throughout the entire of the county, which was increased by the publication of inflammatory placards, and by denunciations from the altars of many of the Roman Catholic chapels in the county. That the voters in the town of Castlebar were canvassed by each of the popular candidates, accompanied by Roman Catholic clergy and large mobs of persons. That prior to, and at the time of the election, considerable intimidation was used to prevent voters going to the poll, and several of them were beaten by riotous and tumultuous mobs, and others of them carried off by violence, and prevented from voting. That the Rev. Peter Conway, the defendant, had been for several years, and still was, the officiating Roman Catholic curate in the town of Ballinrobe, one of the polling places at the election, and had actively interfered in the election to prevent the return of G. G. O. Higgins. That there was a protracted, angry and excited contest for the election. That in June 1857, G. G. O. Higgins presented a petition to the House of Commons, praying that the election of G. H. Moore might be declared void, upon the ground of intimidation and undue influence. That the petition was referred to a Select Committee of the House of Commons, and that, after due inquiry, the Committee passed a resolution (amongst others), that undue influence and spiritual intimidation prevailed to a considerable extent at the said election, and that, in the exercise of such undue influence and spiritual intimidation, the defendant and the Rev. Luke Ryan were so prominently active, that the Committee deemed it their duty to make a special report to the House of Commons, in order that the House should take such steps thereupon as might be deemed necessary and proper. That by a resolution of the House of Commons, of the 29th of July 1857, it was ordered that the *Attorney-General* for Ireland should prosecute the defendant and the Rev. Luke Ryan; and that, pursuant thereto, *ex officio*

informations were accordingly filed against them respectively by the said *Attorney-General*, in which informations the venue was laid in the county of Mayo. That the presentation of the petition of the said G. G. O. Higgins to the House of Commons, containing, as it did, grave charges against Roman Catholic clergy in the county of Mayo, excited angry feelings, which had not in any degree subsided amongst some of the Roman Catholic clergy, and many of the people of the county, including some of those liable to serve on juries therein; and that a copy of the petition was read from the altar of almost every Roman Catholic Chapel in the county, which had the effect of heightening and perpetuating the feelings of excitement and animosity which previously existed in the county. That a detachment of cavalry having been sent to the town of Ballinrobe, for the purpose, as was supposed, of executing a warrant to compel the defendant to appear to the information, the defendant went to Dublin, and duly entered an appearance, and subsequently pleaded not guilty. That on the Sunday after his return (29th of November 1857), in an address to his congregation from the altar, after the conclusion of Service, the defendant said:— "That, in consequence of information which he had received, that "police and dragoons were on their way to arrest him, he had "determined to go to Dublin, in order to save the bloodshed which "would ensue if he were arrested, as he well knew the feelings "of the people; and that with pride and pleasure he asserted, that "all the police and military from Athenry to Ballinrobe would "not arrest him; and that he had it from good authority, that, if "he were arrested, the people would assemble between Athenry and "Dublin and tear up the rails for miles, and that he wanted to "diffuse amongst the youth who were listening to him, and who "might be called to the priesthood, that the Government of England "hated the name of a Catholic, and would persecute the Catholics." That most of the persons who would be called upon to act as jurors, if the case were tried before a jury of the county of Mayo, took part in and voted at the election, and entertained, and were likely to be actuated by, strong feelings and prejudices in reference to the prosecution and charges against the defendant. That there were

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

900 persons upon the jury list for the county, upwards of 400 of whom could not read or write, and that a jury of fair and impartial men to try the case could not be had from the jurors of the county of Mayo as usually serving. That the jurors generally empanelled at the Assizes were shopkeepers residing in the several towns in the county, and small tenant farmers, amongst whom the defendant had extensive influence, and that very few (if any) of the gentry, merchants and respectable class attended as jurors. That several of the landed proprietors and gentry, residing in the county of Mayo, who opposed G. G. O. Higgins at the election, entertained strong feelings against the prosecution.

Several letters and articles from newspapers advocating various political opinions, and circulating widely in the county of Mayo, were referred to in the affidavits upon the part of the prosecution, to show the excited state of the county, and the influence which they would exercise in preventing those who read them from coming to a just conclusion, if sworn on the trial of the present information; and also a letter published in one of them, and purporting to be addressed by the defendant to Lord Palmerston,* in which occurred the following passages:—"No matter what may "have been the result of the inquiry before the Committee of the "House, as regards my conduct at the late election for this county, "your Lordship will find a different verdict when the case comes "for trial before an unprejudiced jury, enlightened by the legal "acumen of an experienced and learned chairman, neither vain, "weak-minded or prejudiced, and who will not allow hearsay evi-"dence to guide him in his charge. . . . Before you arraign me "and place me on my trial, I claim, as an act of justice, and as "necessary for a fair trial, that you supersede the present High "Sheriff Captain Higgins, the father of Lieutenant-Colonel Higgins, "and also Mr. Isidore Burke, the Crown Solicitor for this county." It further appeared, by the information of John Gannon, sworn on the 8th of July 1857, that he was one of the witnesses examined before the Select Committee of the House of Commons, and that, on the day after his return to Castlebar from London, he was

* Then First Lord of the Treasury.

assaulted, and his life imperilled by a mob, which followed him, crying out, "Why did you go to prosecute your priest?"

Several affidavits were made in reply to those on the part of the prosecutor, denying several of the statements therein, and stating that, according to the knowledge and belief of the persons swearing them, a fair and impartial trial could be had in the county of Mayo; and, amongst them, one by the defendant himself, relying upon his constitutional right, as an elector, to express his opinions, and to oppose the election of a person in whom he had not confidence. That Isidore Burke was a partizan of G. G. O. Higgins at the election, and that he believed that Isidore Burke had a personal animosity against him, and did not stand impartially between the Crown and defendant. That no greater excitement prevailed than had existed at former elections in the county, or than usually takes place before a contested election. That the defendant never read the petition of G. G. O. Higgins to the House of Commons from the altar of his chapel; and that he believed it to be utterly untrue that a jury of twelve fair and impartial men could not be had from the jury list, to try the case fairly and impartially; and that impartial verdicts had been obtained in the county, in cases involving much religious excitement, and more calculated to influence the minds of jurors than mere political feelings could. That in 1853, a jury of the county of Mayo, composed partly of Protestants and partly of Roman Catholics, convicted a monk of the monastery of Partree, near Ballinrobe, of the offence of burning a Bible; and that, in the same year, a jury of the said county, similarly composed, acquitted the Protestant curate of the island of Achill, of a charge of assault preferred against him by a Roman Catholic curate in the same island. That the deponent had not extensive influence amongst the shop-keepers and tenant farmers in the county, with more than one half of which the defendant was either not at all or very imperfectly acquainted; nor had he such influence through the county as could affect the opinions of the jurors. That the great body of the landed gentry of the county were Protestant, and opposed to the defendant in political and religious opinions, who, it was utterly false, could

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

be prejudiced, or who would hesitate for a moment to bring in a verdict according to the evidence. That the defendant was unable to defray the expense of removing a large number of witnesses to another county.

The *Attorney-General* (with him *J. A. Lawson*), for the motion.

In a criminal proceeding, this Court has a Common Law jurisdiction to direct the case to be tried before a jury in any county which it may in its discretion select, and will exercise that jurisdiction upon a proper case being made out for it. The general principle is laid down in *Regina* v. *Palmer* (*a*). In that case, however, it was necessary to pass the 19 & 20 *Vic.*, c. 16, because the Central Criminal Court, to which the trial was removed, is not a Common Law jurisdiction, but comprises the city of London, the county of Middlesex, and parts of other counties. The statute 19 & 20 *Vic.*, c. 16, is declaratory of the ground upon which the discretion of the Court in removing the issue should be exercised, viz., "whenever it shall appear expedient to the ends of justice" (*b*). The present case is one of misdemeanour (*c*), and in such cases this jurisdiction is well settled: *Rex* v. *Lewis* (*d*); *Rex* v. *Thomas* (*e*). The strongest case on the other side is *Proctor* v. *Philips* (*f*), in which Hale, C. B., refers to *Bowbridge's case*, in which it appeared that "all the county was concerned, otherwise no foreign venue ought to be awarded." If that were now required, the affidavits in the present case show that the whole county is concerned. In *Rex* v. *Hunt* (*g*), it appeared that, in the county of Lancaster there was nearly ten times the number of jurors which there is in the county of Mayo; yet in that case a suggestion similar to the present one was entered upon the record. That case puts the law upon the true ground (*h*), viz., "Because it might possibly happen that persons "might be summoned upon the jury, whose opinions might be

(*a*) 5 El. & B. 1024. (*b*) Sec. 1.

(*c*) It was a prosecution under 17 & 18 *Vic.*, c. 102, s. 5.

(*d*) 1 Str. 704.

(*e*) 4 M. & S. 442, and cases in note, 444. (*f*) Hard. 311.

(*g*) 3 B. & Ald. 444. (*h*) p. 446.

"tainted with very strong prejudice, but whom it would, nevertheless, "not be competent for the defendant to challenge:" and so in *Regina* v. *Simpson* (*a*). This Court also has exercised the same jurisdiction in *Regina* v. *Kennedy:* * and although in *Lucan* v. *Cavendish* (*b*), the Court refused to change the venue, it was because it was not shown to the satisfaction of the Court that a fair trial could not be had where the venue was laid. The same jurisdiction exists even in cases of felony, although in some instances the Court has been slower to exercise it in such cases: *Rex* v. *Mead* (*c*); *Rex* v. *Penprase* (*d*); *Rex* v. *Holden* (*e*). In the latter case, Lord Denman, C. J., says:—"If I thought it necessary for the purpose of a fair trial, I should be disposed to grant this application" (*f*). The language of the Court has been sometimes misrepresented upon the point in question; thus, in *Rex* v. *Harris*, as reported in *W. Blackstone* (*g*), Lord Mansfield, C. J., is reported to have said, "We must be satisfied that there is not a possibility of a fair trial in the proper county;" but the case is better reported in *Burrowes* (*h*), where the true ground is stated, viz., that the motion was grounded merely upon an affidavit of *belief* that there could not be a fair and impartial trial; and Lord Mansfield, C. J., said, "As the party cannot traverse the suggestion, there must be a "clear and solid foundation for it. This general swearing, to

(*a*) 5 Jur. 462. (*b*) 10 Ir. Law Rep. 536.
(*c*) 3 D. & R. 301.
(*d*) 4 B. & Ad. 573; S. C., 1 N. & Man. 312.
(*e*) 5 B. & Ad. 347; S. C. 2 N. & Man. 167.
(*f*) p. 355. (*g*) 1 W. B. 378.
(*h*) 3 Burr. 1330.

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* We are indebted to the Master of the Crown office for the note of this case, and that of *Regina* v. *Gray*, post, p. 514.

THE QUEEN, at the Prosecution of CROFTON M. VANDELEUR,
*v.*
CAPTAIN KENNEDY.

W. H. BRERETON (*Martley* with him) moved to enter a suggestion on the roll, that a fair and impartial trial of the issue could not be had by a jury of the county of Clare, and that it was just and desirable that it should be tried by a jury of the county of Kilkenny, or such other county as the Court should direct.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

"apprehension and belief only, is not sufficient" (*a*); and so in *Regina* v. *Gray*.* In pursuance of a similar principle, the venue may be changed by 6 *G.* 4, c. 51, s. 3, from a county of a city, or town, or town corporate, to the next county, without the necessity of an application to this Court. Next, the affidavits in this case disclose ample grounds for the exercise of the discretion of the Court.

*T. O'Hagan* and *Buchanan*, contra.

Two questions are involved in this case; first, as to the extent of the jurisdiction of the Court, and secondly, as to its exercise. This is a case of first impression. *Regina* v. *Gray* is the only case hitherto in Ireland upon this point, and that was eventually tried by a special jury, and the prisoner convicted. In *Regina* v. *Simpson* (*b*) also, the rule was granted for a special jury, and

(*a*) p. 1333. (*b*) *Supra*.

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*Brewster* (*J. D. Fitzgerald* with him), *contra*.

This was a criminal information in the name of the Master of the Crown office. It appeared by the affidavit of the defendant, who was the poor-law inspector of the Kilrush Union in the county of Clare, that the prosecutor was a large landed proprietor, and possessed of extensive influence in that county.

The Court moved the trial to the county of Cork, which was not an adjoining county.

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* THE QUEEN *v.* SAMUEL GRAY.

At the Spring Assizes 1841, for the county of Monaghan, the prisoner was tried for the murder of Owen Murphy, and acquitted. At the Spring Assizes 1842, for the same county, the prisoner was indicted for shooting at J. Cunningham; but owing to the illness of a juror, the jury were discharged without arriving at a verdict. At the Summer Assizes 1842, for the same county, the prisoner was again put on trial for the last mentioned offence; and the jury, not having agreed, were discharged. Subsequently, the indictment was removed into this Court by *certiorari*, with a view to an application to have the case tried elsewhere than in the county of Monaghan.

It appeared by the affidavit of J. Hamilton, the Crown Solicitor for the county of Monaghan, that he believed that it would be conducive to the ends of justice to have the prisoner tried elsewhere than in the county of Monaghan, and that on the previous trial almost all the jury panel had been exhausted by challenge, both upon the part of the Crown and also upon the part of the prisoner.

The Court refused to change the place of trial, and the proceedings were remitted to the county of Monaghan by *procedendo*. The prisoner was subsequently tried on the civil side of the Court, and convicted.

the Crown can have this present case tried before a special jury, if the *Attorney-General* thinks fit. *Regina* v. *Kennedy* (*a*) was a case between two private persons, not between the Crown and a subject; and the Court will be slow to exercise an extraordinary jurisdiction, in a case prosecuted by the unusual mode of an *ex officio* information, and by order of the House of Commons. First; the only jurisdiction which the Court possesses is to remove the trial to the next adjoining county. Formerly, criminal cases must have been tried in the county in which the offence is alleged to have been committed: 2 *Hawk. P. C.*, c. 25, s. 34; but when this rule was relaxed, and such a suggestion as the present one permitted to be entered, it was not for the purpose of setting the venue at large generally, but merely to remove it from a limited jurisdiction, where prejudice might naturally exist to a great extent, to an adjoining county: *Gilb. Hist. C. P.*, p. 88; *Rex* v. *Inhabitants of Wilts* (*b*), 5th resolution; *Rex* v. *Amery* (*c*); *Rex* v. *St. Mary on Hill Chester* (*d*); *Anonymous* (*e*); *Rex* v. *Fawle* (*f*), and the cases cited on the other side: *Rex* v. *Lewis*; *Rex* v. *Thomas*; *Regina* v. *Simpson*. We do not object to the present case being removed to an adjoining county. This point is ruled by *Rex* v. *Harris* (*g*). Lord Mansfield, C. J., there says:—"No two "things can be more different than changing the venue, and con- "tinuing as it was, with such a suggestion on the roll as is now "proposed;" and again, "If the matter cannot be tried at all, "or cannot be fairly and impartially tried in the proper county, "it shall be tried in the next adjoining county (*h*)." That case has not been overruled; but, on the contrary, it has been adopted by this Court in *Dowling* v. *Sadleir* (*i*). The only case in which a trial has been moved from one great county to another great county is *Rex* v. *Hunt*. The motion in that case was rested upon two grounds; first, that large bodies of persons were directly inter-

(*a*) *Supra*.
(*b*) 6 Mod. 307.
(*c*) 1 T. R. 363, 367.
(*d*) 7 T. R. 735.
(*e*) 12 Mod. 503.
(*f*) 2 Ld. Ray. 1452.
(*g*) 3 Burr. 1330.
(*h*) p. 1333.
(*i*) 3 Ir. Com. Law Rep. 603, 606.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

ested in the question; and secondly, that this interest would not be a cause of challenge for the defendant, upon whose application the place of trial was changed. Neither of those grounds apply to the present case; the *Attorney-General* may challenge as many jurors as he pleases. In *Regina* v. *Palmer*, cited upon the other side, the Court was not called upon to decide the present question; it was not discussed, and therefore the judgment of Lord Campbell, C. J., as to that is an *obiter dictum*, and will not be held to overthrow the previous law. In *Rex* v. *Holden* (*a*), a motion similar to the present one was refused. Next; the Court will only exercise its discretion, in moving the trial, upon a proper case being made out; it must be satisfied, upon the facts before it, of the truth of the suggestion, and will not be influenced by allegations of belief: *Rex* v. *Harris* (*b*); *Rex* v. *King* (*c*); *Rex* v. *Penprase* (*d*). In *Dowling* v. *Sadleir* (*e*), Moore, J., says:—"It "would at all times require a very strong and clear case to induce "me to say that a fair trial could not not be had in any county "in Ireland. I would be slow to say that, if a man were interested "in a matter of a political and exciting description, he would, "therefore, neglect his duty" (*f*). The alleged transactions which are the subject of this information are old now; and in *Rex* v. *Holden* (*g*), Lord Denman, C. J., says (*h*):—"Considering the time "which has now been afforded for prejudice to die away, and feeling "a perfect persuasion that, with the right of challenge, and the "benefit of selection from so large a county, the defendants may find "an unprejudiced jury in Suffolk, I am of opinion that the balance "of convenience is against this application." There can be no impeachment, at all events, against the special jurors; and the Court will not, therefore, unless coerced, pronounce civil excommunication upon the jurors of the county of Mayo, when the Crown possesses a right of challenge, which the defendant does not

(*a*) 5 B. & Ad. 347; S. C., 2 N. & Man. 167.
(*b*) 1 W. B. 378; S. C., 3 Burr. 1330. (*c*) 2 Chit. R. 217.
(*d*) 4 B. & Ad. 573; S. C., 1 N. & Man. 312.
(*e*) 3 Ir. Com. Law Rep. 603. (*f*) p. 608.
(*g*) *Supra*. (*h*) p. 355.

possess; besides, the defendant is wholly unable to defray the cost of removing witnesses to a distance.—[The *Attorney-General.* Upon the part of the Crown, I undertake to defray the cost of such necessary witnesses as the defendant may require to call.]—The publications in the newspapers, which have been referred to, cannot in any way affect the defendant upon this motion, inasmuch as he has been in no way proved to have been connected with them: *Seeley* v. *Ellison* (*a*).—[LEFROY, C. J., upon the point of jurisdiction, referred to *Fairwether's case* (*b*), and *Rex* v. *Inhabitants of Notts* (*c*), referred to by Wilmot, C. J., in *Rex* v. *Harris* (*d*).]—*Fairwether's case* was merely an argument whether the case should be tried in the county at Nisi Prius, or *in Banco.* *Rex* v. *Inhabitants of Notts* is alluded to by Wilmot, J., in *Rex* v. *Harris*, as "done by consent."

*J. A. Lawson*, in reply.

The question is not, whether in the county of Mayo twelve honest jurors could not be found? but it is whether, in the ordinary course of things, a fair and impartial trial can be had there? On the other side it is said, that by dexterity, management, and the exercise of the prerogative of the Crown, twelve men might be found who will try the case fairly and justly. But the defendant, in his letter to Lord Palmerston, denies that he can have a fair trial in the county of Mayo. The jurisdiction of the Court to grant this motion cannot be disputed now. This suggestion, like that in *Rex* v. *Hunt*, consists of two parts; first, that a fair trial cannot be had in the county; and secondly, that it is convenient that it should be tried elsewhere. As to the first part of the suggestion, the affidavits furnish three classes of proofs; first, matters before the election; secondly, matters during the election; and thirdly, matters subsequent to the election. The assault upon Gannon would of itself be sufficient to show that it would not be safe for the interests of justice that the case should be tried in the county of Mayo. The whole county has been implicated

(*a*) 8 Dowl. P. C. 266.
(*b*) Cro. Car. 348.
(*c*) 2 Lev. 112.
(*d*) 3 Burr. 1334.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

on one side or the other; and it is a strict and wholesome rule of law, that no person shall be a judge in a cause in which he is himself in any, even the slightest, degree interested: *Dimes* v. *The Grand Junction Canal Co.* (*a*). Next; as to the extent of the jurisdiction of the Court. When the Court has decided that a fair trial cannot be had in the county of Mayo, it is fettered by no rule as to the place to which it shall remove the trial. The principle is clearly laid down by Lord Campbell, C. J., in *Regina* v. *Palmer* (*b*). So, in *Rex* v. *Holden* (*c*), the notice of motion was, that the issue should be tried by a jury of the county of Kent, "*or of such other county as the Court should direct;*" and a rule *nisi* was granted, which, it is alleged upon the other side, the Court had no jurisdiction to grant. *Fairwether's case* (*d*) proves the practice of the Court clearly; and in all the cases which have been cited on the other side, the notice was, "to the next adjoining county, *or to such other county,*" &c. The expression "*next adjoining county*" probably crept into the notices from the statute 28 *Hen.* 8, c. 6, referring to the next English county adjoining Wales, because the King's writ did not, at that time, run into Wales.

PERRIN, J.

*Jan.* 23.

This is a motion on the part of Mr. *Attorney-General*, calling upon the Court that he may be at liberty to enter a suggestion on the roll, in this cause, that a fair and impartial trial of the issue joined in this prosecution cannot be had by a jury of the county of Mayo, and that it is convenient that it should be tried by a jury of the county of Dublin, or such other county as to the Court shall seem fit. It is an information filed by Mr. *Attorney-General* against the Rev. Peter Conway, for various breaches of an Act of Parliament, passed in the 17th & 18th years of the reign of her present Majesty, for the suppression of various offences attending and disturbing the due election of Members of

(*a*) 3 H. L. Cas. 759; S. C., 17 Jur. 73.
(*b*) 5 El. & B. 1028.
(*c*) 5 B. & Ad. 347.
(*d*) Cro. Car. 348.

Parliament. The information is founded upon the 5th section of that Act, c. 102; and in the various counts it charges the traverser with obstructing the various electors in their progress to the respective places of polling at the election. There are several different individual charges against him. In respect of some voters, there are charges of impeding, obstructing, assaulting and imprisoning, and various similar charges as to other persons; and one for using what is called spiritual intimidation, and calling down and using imprecations of a very shocking nature, to prevent persons from the due exercise of their elective franchise. The charges laid in the information are grave and serious offences—offences which require suppression, and, if necessary, punishment. This is a wholesome Act of Parliament, and, if enforced strictly and fully, is likely to be attended with benefits of very great advantage. The *Attorney-General* has filed this *ex officio* information; and in inquiring into the subject-matter of the suggestion sought to be entered, it is convenient, in the first instance, to see what are the courses open to the *Attorney-General* upon this information. He has filed it, and there has been a plea of not guilty put in to it: it is open to him to have a trial at Bar here, before a jury of the county of Mayo; it is open to him also to have a trial before a special jury in the county of Mayo, and, if tried there, there might be a trial at Nisi Prius before the ordinary Nisi Prius panel there. These three courses are all open to the *Attorney-General.* The first of them, the trial at Bar here, is perfectly free, not only, in my opinion, from any charge or imputation of want of impartiality, but also is free from the possibility of interference or disturbance by supposed or imaginary riots, or tumultuous obstruction at Castlebar. The affidavits upon which this application is made run into a great variety of topics, and embrace a great many matters which I shall not advert to, because they do not appear to me to affect the question before us. The question simply is, whether or not the suggestion, which we are called upon to enter upon the roll, is shown to be true or not? Unless we are perfectly satisfied of the truth of that suggestion, we clearly ought not to enter it. The law upon the subject is perfectly plain. We

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

have been referred to a great number of authorities upon both sides; but I do not think there is any real difficulty upon the question of law. The first authority to which our attention has been called is one of great weight and importance, from the high character of the Court and Judges by whom it was adjudged, nearly a century ago—I mean the Court of Queen's Bench in England, with Lord Mansfield at its head. In the case of *The King* v. *Harris* (*a*), upon an application to enter a suggestion such as that now proposed, Lord Mansfield says:—"No two "things can be more different than *changing* the venue, and *con-* "*tinuing* it as it was, with such a suggestion on the roll as is now "proposed....If the matter cannot be tried at all, or cannot be "fairly and impartially tried in the *proper* county, it shall be tried "in the next *adjoining* county. But as the party cannot traverse "such a suggestion when entered by a rule of Court, there must be "*a clear and solid foundation* for it." This is the question in this case, whether there is *a clear and solid foundation* for the statement that a fair and impartial trial cannot be had by a jury of the county of Mayo? The question is of great public concern-ernment, as well as of importance to the parties. The ancient doctrine of trial by jury of the neighbourhood is found in the Institutions of Alfred, and deserves to be noted. *Hume* (*b*) speaks of it as being the origin of the jury:—"An institution, admirable in "itself, and the best calculated for the preservation of liberty, and "the administration of justice, that ever was devised by the wit "of man." That is the opinion of a sage, and dispassionate, and deeply-informed man. The same doctrine is thrown out by Wilmot, J., in the very case to which I have referred. He says:—"There is no rule better established than that all causes," that is, all criminal causes, "shall be tried in the county, "and by the neighbourhood of the place, where the fact is com-"mitted (*c*);" and I have for more than two-thirds of a century learned, and been successively confirmed by that time in the conviction, that trial by a jury of the vicinage is of the essence of

(*a*) 3 Burr. 1330. (*b*) Hume, Hist. Eng., c. 2, Alfred.
(*c*) *Rex* v. *Harris*, 3 Burr. 1334.

the protection of the rights and liberties of the people of the kingdom; and I do think that any question touching it is of the utmost importance. No doubt, experience has shown, in the progress of events, that exceptions must exist, and exceptions have been established to the extent of the original provision, which are now as much the law of the land as the original rule itself. But I think we ought to be very careful, in any inquiry upon the subject, to see that we do not go beyond the actual necessity, and that we do not trench upon the real principle of the rule. In this case, I have said that, three courses are open to the *Attorney-General:* one a trial at Bar, by a jury taken from the grand panel of the county of Mayo; one a trial at Nisi Prius before a special jury, and one a trial at Nisi Prius before a common jury of that county. I may notice here, that there is another mode of trial alluded to in some of the affidavits, and upon the administration of which, in Castlebar, disparagement is cast, and justly, if the matters stated as to the juries there to be empanelled be true; but it is observable that, by no means or contrivance, could this issue come before this tribunal: the *Attorney-General* cannot try it at the Assizes in the Criminal Court. Now, with respect to the jury, a good deal has been stated in the affidavits with respect to the jury book, and the jury panel in the county of Mayo. It does not come before me, so that I shall not observe upon the manner in which it is brought forward, by hearsay and individual opinion upon the subject, instead of producing the jury book. One panel was produced by the *Attorney-General*, but I have made inquiry for the panel which was called at the last Assizes of the county of Mayo at Castlebar, and, upon it, it appears that the panel contains the names of several Baronets and others, as Sir Richard A. O'Donnell, Valentine O'C. Blake, Sir Robert Lynch Blosse, and Vaughan Jackson; and we who have gone that circuit frequently must know the respectability of these persons. It is stated in that imperfect return submitted to us, that there is but one Lord upon the panel; but in this return, called at the last Assizes, there are two—Lord John Browne and Lord Bingham; then follow the Hon. Thomas Dillon, the Hon. Archibald Bingham, the Hon. William S. Russell, the Hon. J. S. Browne, the

H. T. 1858.
*Queen's Bench*
THE QUEEN
v.
CONWAY.

Hon. S. H. Perry, the Hon. G. S. Yelverton, Sir Compton Domvile, the Hon. G. Browne, and others. The panel called upon that occasion contained nearly 150 names, men of the county, who could not, for character and position, be exceeded in most of the counties of Ireland; and I think the view suggested by Mr. *Lawson* was a very sound one, viz., that the question here is not, whether or not we could pick out a good jury? the question really is, whether there is upon the face of the panel a body of men such as by character and station are above imputation? That is what the parties on the one side and the other have a right to require; and if the panel shows it, I, for one, cannot come to the conclusion that I can approve of the suggestion, or give my countenance and sanction to the statement, that a fair and impartial trial cannot be had from the county of Mayo. A great deal of misconduct, of intemperate and unbecoming conduct, has been imputed in the affidavits, and has not been satisfactorily denied, I regret to say (if that be of any importance in this issue), by the rev. defendant here. If this were a question of mere personal concernment, his case would be greatly disparaged by his own misconduct; I do not mean by matters to be investigated upon the trial, but by matters mentioned in the affidavits, which have occurred since the institution of the prosecution, and which are not denied. But that is not the question; the question is, whether or not there can be, or whether it is shown there cannot be, in the words of the application, a fair and impartial trial had before a jury of the county of Mayo? I have alluded to the panel upon which the grand jury of the last Assizes was empanelled, and I have mentioned a few of the names upon the list which was brought forward on behalf of the prosecution, and upon another list of the same sort; and it is enough to say, that there appear to be upon them men of respectability, character and station, on whom no disparagement can be cast. It is said, and I believe with truth, that there was a very violent and excited contest in 1857, and that hardly any man in the county did not take part in it. But does it follow from that, that the men who may have been excited, and have taken a strong part—does it follow, in the words of Wilmot, J., in the case I have already

referred to (*a*), "that, because a man voted on the one side or on "the other, he would therefore perjure himself to favour that party, "when sworn upon a jury?" that, because men take a strong and impassioned part upon any question, upon a trial of an issue, as jurors, on such a question as that suggested here, there is reason to doubt they will act fairly, justly and impartially, on their oaths? "This is no question relating to *the interest of the voters;* it is "only whether the defendants, the persons particularly charged "with this misdemeanour, have *personally* acted corruptly or not?" These are the words of Mr. Justice Foster (*b*) on that occasion, and they apply equally to this as to that. Wilmot, J., in the same case, further says:—"There is no rule better established, than that all "causes shall be tried in the county, and by the neighbourhood "of the place, where the fact is committed; and therefore that rule "ought never to be infringed, unless it fairly appears that a fair and "impartial trial cannot be had in that county (*c*)." That is the only question. Where that does sufficiently appear, the Court had no doubt of the power to depart from the general rule; where it does not appear, it has not that power. I have mentioned as to the grand panel. Now, if there is any defect upon it, it is to be observed that it may be corrected, and it is the duty of the incoming Sheriff to correct it, under the 3 & 4 *W.* 4, c. 91, s. 24, by which it is enacted—"That the Sheriff of every county, city and town "respectively, or his Under-sheriff, shall, within ten days from the "delivery of the jurors' book, for the current year, to either of "them, take from such book the names of all such persons as are "sons of Peers, and of all Baronets, Knights, Magistrates, &c., and "cause the same to be fairly copied out, in a separate list, to be "called 'the special jury list;'" and that shall furnish the ground, basis and substance of the special jury list: and, upon looking to this statement, with respect to the county of Mayo, I find that there are no less than 110 or 120 actual Magistrates of the county of Mayo, every one of whom ought to be upon the special jury list: and can it be fairly asserted—can we be called upon to certify, so as not to admit it to be contradicted, so as to be conclusive,

(*a*) *Rex* v. *Harris* (3 Burr. 1335). (*b*) p. 1334.
(*c*) p. 1334.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

that a fair and impartial trial cannot be had by a jury of a list comprising 110 or 120 of the Magistrates, and of the first men of the county? That is the question, in my mind. I have no doubt, in law, of the right of this Court to take the trial from the county of Mayo, if there cannot be a fair and impartial trial had there. I have some difficulty as to how far the rule can go, and where the trial ought to be; but it is not necessary to discuss that, because I am perfectly convinced that I cannot honestly and truly make that statement, or authorise that suggestion. There is a great deal more to be said upon the subject; but it has been so fully discussed, and the opinion of the CHIEF JUSTICE so clearly given some time ago in this Court, that I do not think I ought to consume any more time upon this occasion. I am quite convinced that I cannot acquiesce in, or be a party to the entry of, that suggestion; and therefore, upon the best judgment which I can exercise, I must decline to grant this application.

CRAMPTON, J.

In this case, I do not intend to occupy much of the public time. The case before us has been very fully, and certainly very ably, argued, and it involves a question of great importance, perhaps of some delicacy. Many topics appear to me to have been pressed into the argument, which might have been omitted. There is one in particular, upon which I cannot avoid making an observation. In the very able and eloquent speech of the leading Counsel for the defendant, we have been strongly pressed and urged not to be intimidated by the *Attorney-General* into a decision adverse to the subject, and favourable to the Crown, not to take the part of the strong against the weak. Now, let me assure the learned Counsel, and the Bar in general, that the Judges of this Court—I speak not merely for myself—have never been, and, I trust, never will be, actuated by any such motives. We shall fearlessly discharge our sworn duty, I would say, equally regardless of popular applause and of the fear or favour of the Crown. I may say, in classical language:—

*Non civium ardor prava jubentium,*
*Non vultus instantis tyranni*
*Mente quatit solida.*

I need not enter into the character of this information which is now before the Court, founded upon a recent statute. The defendant here is not upon his trial; I think I might say that it is the county of Mayo which is upon its trial. Two questions, as I take it, have been raised and argued on this occasion; one of law, as to the jurisdiction of the Court; the other of fact, as to the propriety of its granting the motion of the *Attorney-General* for changing the venue, for so I would call it. Now, we have had a great deal of very good declamation upon a popular topic. It is said, that the Court should take care not to infringe upon the Common Law right of the defendant to have his trial take place in the proper county—why that is a Common Law right; but it is a Common Law right equally open to prosecutors and defendants; it is the law, generally speaking: but there is another Common Law right, equally open to defendants and prosecutors, namely, that where it appears that either party cannot obtain a fair and impartial trial in the proper county, then this Court, the Superior Criminal Court of this country, has jurisdiction to take the case out of the proper county, as it is called, and to bring it into an indifferent county; and I think I may go further, and say, that it is the duty of this Court, when such a case as that is made out, to change the venue, for the benefit of the defendant and the prosecutor equally. Now, this jurisdiction to change the venue, upon a suggestion to be entered upon the roll, has been exercised by this Court from a very early period. We have reported cases, where the doctrine is laid down in emphatic language; we have the practice of the Court of Queen's Bench in England, independently of any practice of our own Court. I do not mean to enter into this array of cases; but the general jurisdiction of the Court, in a proper case, to change the venue from one county to any other, cannot be the subject of doubt, nor is it so, when we look to the recent authorities. And I may as well notice here a very important authority, which shows us not only the jurisdiction, but also the practice of the Court; I allude to the case cited by my LORD CHIEF JUSTICE, the case in *Croke, Charles* (*a*), where the officer of the Court stood up, in the presence

(*a*) *Fairwether's case*, supra.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

of the Court and the Bar, and said:—"That divers precedents "have been of such trials upon indictments *in Banco*, without any "consent of the parties, and against the will of the prosecutors, and "in more remote counties"—a declaration made in the presence of the Judges and the Bar, and not contradicted by any person. I consider that to be a very valuable authority, if we required it. But there are two or three cases, to which I will advert, upon the subject, perhaps unnecessarily, after the discussion the case has undergone, and after hearing, not only the able speeches made in the opening, and by the defendant's learned Counsel, but also the masterly reply of Mr. *Lawson*. I will only refer to *Hunt's case* (*a*) and *Palmer's case* (*b*). What do these cases show? *Hunt's case* shows not only that the Court has discretion, where it apprehends that a fair trial may not be had in the proper county—not only that it has discretion, but that it is bound, to transfer the venue to an indifferent county. Let us recollect that, in that case, the county from which the venue was transferred was one in which there were not less than 8700 jurors on the jury list. The county from which we are called upon to transfer this venue is one in which there are 800, *or, at the utmost*, 1000 jurors—what a contrast is that. Will any learned Counsel tell me that there might not have been an impartial special jury found among those 8700 jurors in Lancashire? Surely, there must have been a large body of resident noblemen, gentlemen, merchants and persons of condition and position in that county; but did it ever occur to anybody, until they heard the argument at the Bar of this Court, that either the defendant or the prosecutor was to be deprived of the power of changing the venue from an infected county (so to call it), because he might possibly have a jury of high character, condition and position in the county, by striking a special jury? I do venture to say, that it is the first time such a topic was ever addressed to a Court of Justice, on such a question as this which is now raised; and surely, if it was a legitimate topic—if it was open to a party to suggest such a course, and to compel the defendant or prosecutor to take that course, we should have heard something of it in that case. Now I will advert, for a moment, to

(*a*) *Supra.* (*b*) *Supra.*

*Palmer's case*, because it is a case very much indeed in point upon the present occasion. That was an application, not to change the venue actually, but for a *certiorari*, for the purpose of changing the venue to the highest tribunal which could be found in England—I mean the Central Criminal Court; and an Act of Parliament was passed, to enable that transfer to be made to that which was not properly a county in itself; but the Act of Parliament did not otherwise interfere with the Common Law right. It is by the Common Law that the venue is fixed in the proper county, for the protection of the subject; and it is also by the Common Law that the transfer is to be made in a proper case. Now, the application in *Palmer's case* was not made by the Crown, but by the traverser: this makes no difference; the law is the same in both cases. The traverser has the same right which the prosecutor has; and I therefore consider this case to be very much in point indeed. It was said that this was a case of consent; far from it; the Attorney-General indeed consented, he was quite willing that the trial should take place, according to the wish of the traverser; but he went further, and undertook, as has now been done, to pay any additional expense which the traverser might be put to, out of the pocket of the Crown. Therefore, as to expense, no difficulty arose; but Mr. Huddleston, the Counsel instructed in support of the prosecution, opposed the motion; he objected to it, and cited authorities; he did not go the length that has been gone here, of denying the jurisdiction of the Court, but he denied that it would be a proper exercise of the discretion of the Court to make the change sought to be made. This, therefore, was not an order made upon consent at all; it was made *in adversum* as to Mr. Huddleston's client. Lord Campbell, a Judge of great eminence and of great experience, the Chief Justice of England, stating the principle of law upon adjudged cases, and the known practice of the Court of Queen's Bench, says:—"No doubt, after the indict-"ment has been removed, there may be a trial at Bar, though "at present I see no ground for that; or there may be a trial "in any county in England, in which the Court may think it

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

"right that such a trial should take place (*a*)." That indeed was a very strong case, because the motion was made before any indictment had been found, and therefore in that respect it was an anticipative order. Lord Campbell, in the passage above cited, said:—"There may be a trial at Bar, though at present I see no ground for that." I would say the same, with respect to this Court. The *Attorney-General* may apply to the Court for that, and his application will be granted, as of course, though I see no ground for the application.

Now, the affidavits on the part of the Crown have been greatly criticised on this occasion. I do not mean to go into the affidavits in *Palmer's case;* but they are not nearly so strong as the facts stated in the affidavits before this Court. It is the "*apprehension and the belief*" of parties which is relied upon in *Palmer's case;* the apprehension and belief of the party making the motion, and his attorney, are the chief grounds of the order. Unquestionably, there was great excitement existing in the county in which Palmer had committed his atrocious acts, and there were circumstances from which it did become a proper exercise of the discretion of the Court to remove the trial. The other Judges merely reiterate the view which Lord Campbell, C. J., took, justly and properly affirming what is the practice and authority of the Court. Therefore, I do take the liberty of saying now, that it is the undoubted jurisdiction of this Court, in a proper case, to remove the trial from the proper county, so to call it, to any county, as Lord Campbell says, "in "which the Court may think it right that such trial should take "place." I hope this principle will not be brought into controversy or question again. I know not any other principle which might not, with equal justice, be questioned, if this be the subject of controversy. Such then being the undoubted jurisdiction of the Court, I take it to be a proposition equally true, that it is the bounden duty of the Court, in protection of the subjects of the realm, in a proper case to change the place of trial. I do not go further than that—that is the doctrine of law, and a most wholesome one it is. This Court is the overseer of all inferior tribunals

(*a*) 5 El. & Bl. 1028.

for the administration of justice, and is bound to see that there shall be no failure of justice from any cause which it is in the power of this Court to remedy. If there ever was a case which imperatively called upon the Court to exercise its discretion, it is the present. If the facts stated in these affidavits are to be taken as the facts by which the Court is to be guided, I do not see how it is possible for the Court to do otherwise than comply with the motion of the *Attorney-General.* I lay no stress on the circumstance that the prosecutor in this case is the *Attorney-General*, and not a private person. I lay no stress whatever upon the circumstance that this prosecution has been instituted by order of the House of Commons. No; I would make precisely the same rule, if the prosecutor, instead of being her Majesty's *Attorney-General*, were a private person, and as if the House of Commons had never pronounced any opinion upon the subject. If we are not to be intimidated by the *Attorney-General* and the Crown, we shall not yield to the influence of the House of Commons; but wherever partiality, prejudice and passion are shown to exist throughout an entire county, I think this Court is bound to remove the trial. Now, has this state of things been shown by the affidavits in this case? I shall not go fully into them, but will only mention a few of the facts contained in them, and either admitted or not contradicted; I state them in their order, having read the affidavits. The first fact upon which I lay my finger is this—here is an excitement alleged to exist throughout the entire county—that is the statement, and it is not encountered by anything which amounts to a denial: and was it a mere ordinary election excitement? No; it was a religious excitement—a political excitement—both elements concurring together to disturb all the free action of the voters in the county. Is that excitement partial? No; it extends over the entire county, and is not confined, I apprehend, to the lower classes; and I have yet to learn that men of position, and men of education, Magistrates, or the sons of Peers, and gentlemen, are not liable to partiality, prejudice or passion, as much as persons of a lower class are subject to these feelings. I do believe, as has been said, that in the county of Mayo there is a body of gentlemen of high con-

H. T. 1858.
*Queen's Bench*
THE QUEEN
v.
CONWAY.

dition, honour and probity, to whom respect is due; but I do also believe that there is a great body of yeomanry called into the jury-box on ordinary occasions, who are honourable and just men also. Honour, justice, virtue and probity are fortunately not confined to any one class, and perhaps these noble qualities may be found to be as extensively applicable to the middling class, as to the highest classes in the country. Well now, so much for excitement; what have we then? We have this (taking the distinction made by Mr. *Lawson* in his able reply), we have acts before the election, during and after the election, all pointing to the same result, all indicating the same diseased state of the county, all showing that it would be a matter of extreme difficulty to find out these so much talked of twelve indifferent men, free from partiality and prejudice, to try this case in the county of Mayo; if otherwise, it would be safe to try it there. We have accounts of mobs, excited mobs, I do not say of whom, or by whom led, but under influences political and religious; we have the fact of people, properly called mobs, determined to take the election into their own hands, stopping voters, beating them, and compelling them to swear to vote for the popular candidate, or not at all. Freedom of election, very eloquently eulogised by Mr. *O'Hagan*, is a most valuable thing; but the best mode of preserving it is by repressing such outrages as these which are brought before us in the present affidavits. Well, may not, must not, the same influences prevail upon a trial at Castlebar, or will they not invade the jury-box itself? What, further, have we? We have the county covered with inflammatory placards, calling upon the voters to vote in a certain direction, or for a certain candidate; and it is alleged that this matter, which I am going to refer to, took place in almost every chapel in the county, namely, the denunciations of a particular candidate, and curses invoked upon those who should vote for him. These circumstances show that the whole county is infected. Well then, a petition was presented to Parliament; I will not enter into it; but the Parliament decided that the election was a void election; and I do not care that they decided upon the very grounds on which we are called upon to grant this motion. But what is

done upon this petition? Are the parties who exercise spiritual dominion over the minds of the majority of the people, are they, upon the reception of this petition, satisfied to let the law take its course? No; this petition is read from almost every altar in the county, and made the subject of similar denunciations: and what is inculcated on the people? This doctrine, that the Roman Catholic Church, and the priests of the Roman Catholic Church, were to be made the subjects of oppression and persecution by the Government of the country. Can any one hesitate to believe that, with such matters as these pressing upon the minds of our excitable and generous people, undoubtedly subject to influences on the part of their pastors, the extent of which perhaps some of us cánnot appreciate, are we to be surprised at this demonstration through the county? Well there is a fact, which is a speaking fact—a warning fact for the Court:—A witness named Gannon was examined before the House of Commons; he came home to his house in the county of Mayo. What is the result? Under the same influences which I have mentioned, this man is seized by an infuriated mob, and Lynch-law inflicted upon him. What is the charge against him? "Here is the man who prosecuted the priest." I doubt if the *Attorney-General* himself, with all his popularity and power, attending to prosecute in this case, would be safe in the streets of Castlebar; he would not there have the credit, which I am bound to give him here, that he is discharging his duty, fearlessly and honestly, without reference or regard for person or profession. Now, I say nothing about the circulation of newspapers. It is a narrow view to take of this matter to say that the inflammatory articles thus circulated through the county may not be a criterion of the state of the county, unless written or approved of by the party who may be the subject of a motion like the present. It is no such thing; by whomsoever written or circulated, they are materials and evidence from which the Court may draw its inferences. Under these circumstances, I feel it part of my bounden duty to grant this motion; and in so doing, do I cast any imputation upon the gentry, farmers, merchants, or any other class in the county of Mayo? Far from it. Does this

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

suggestion involve any imputation upon the county? By no means. Show me the man who "is not passion's slave." Show me the man who is free from prejudice, who can say that he has no partialities, and then I say that the county of Mayo may be a place where a fair and impartial trial may be had. Now, I before said, I do not impeach in the least degree the honesty, probity, or respectability, of any person in the county; but there is an infectious fever in the county, and all classes from the highest to the lowest are affected by that fever. It is said that it has subsided, but the causes creating it are still in existence. Why the rev. defendant himself, and I do not mean to cast any imputation upon him—every man is presumed to be innocent until he is found guilty by a jury—but it is a remarkable thing, that the rev. defendant himself has made a declaration in writing tantamount to this, that he cannot have a fair trial in the county of Mayo. If the defendant had moved this Court that his case should be tried, not in Mayo, but in an indifferent county, I am of opinion that it would have been the bounden duty of this Court to grant him that motion, not of favour, but of right. Well now, there have been urged at the Bar, and for the first time, topics, I should say arguments, to induce the Court in this particular case not to grant the motion of the *Attorney-General*. First, it is said, the *Attorney-General* is armed with power to set aside every man upon the long panel until he comes to twelve men whom he considers will be fair and impartial jurymen. What? when the evidence is that the whole county is infected; how could the *Attorney-General* arrive at the knowledge of who the twelve men are, who should be selected to try this case? But above all, I say this, that a more odious exercise of authority on the part of a public officer can hardly be contemplated, than a wholesale rejection of the panel returned by the Sheriff, without one constitutional reason for the rejection of a single man. It would degrade the administration of justice, if such an argument were admissible. But then it was argued by Mr. *O'Hagan*, that the *Attorney-General* might have a special jury; and my Brother PERRIN has suggested three modes in which the *Attorney-General* might arrive at the same result; he might have a trial at Bar, if the Court give it to him; but

by whom? By men of the county, who, as far as we can possibly ascertain, are not likely to form an impartial jury. This would be only to transfer the trial from one place to another, without changing the jury, or the result of the trial. But as I intimated before, another mode was suggested, and very strongly pressed upon us, that the *Attorney-General* could have a special jury. It is the first time this argument was ever pressed upon a Court of Justice. Why was it not done in *Palmer's* and *Hunt's* cases? Why was not the objection to remove the place of trial made in those cases, upon the ground that there were thousands of persons of high position and respectability in Lancashire and Staffordshire? Why take this very roundabout and expensive mode of removing the trial from one county to a distant one? Take the list of the special jury for Lancashire; could they not get twelve indifferent men in that county? It is the first time that argument has been addressed to this Court, and I trust it will be the last. I am satisfied that men moving in a higher sphere of society are not so far raised above the smoke and din of the lower world, that they would not be subjected to influences and feelings similar to those affecting their less elevated neighbours. The argument is indeed novel, and it goes this length, that if we were to accede to it in this case, we should in every future civil or criminal case reject every motion to change the venue, upon the ground that an impartial trial could not be had in the proper county. Take any county in Ireland, even the smallest; can any man say that there could not be found in it an impartial special jury? But by what proofs are these jurymen to be found out? That argument has not the least weight with me. I am quite sure that if it were an argument just in itself to be addressed to the Court, we should have heard of it in some of the many cases that have been referred to. Under these circumstances, and upon these grounds, my opinion is, that it will be neither right nor safe to allow this case to be tried in the county of Mayo. I think we are bound to vindicate the law, and the administration of justice, by granting the motion of the *Attorney-General*, and to secure, as far as it can be secured by this Court, a fair and impartial

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

trial, for the benefit of the traverser, as well as for the benefit of the prosecutor. In my opinion, therefore, without a shadow of doubt, the *Attorney-General's* motion is perfectly well founded.

LEFROY, C. J.

The duty, which would otherwise have devolved upon me, upon this occasion, has been greatly abridged by the judgments of my Brethren CRAMPTON and PERRIN upon this question. I have the concurrence of both of them upon the law of the case, viz., that the Court has jurisdiction to make this rule, and, as I understand it, to the extent not only of removing the trial from the county where the venue is laid, but of removing it to any other county, which, in the opinion of the Court, may be considered to be convenient and proper. My Brother PERRIN, I find, differs from this view, and does not go so far, and my duty therefore is somewhat enlarged, because I hold as clearly that this Court has jurisdiction to remove the trial to any other indifferent county, as that it has jurisdiction to remove it at all; and I say that, because I must now proceed to show it from the very same authorities which give to this Court the jurisdiction to remove the trial at all. For this purpose, I shall advert, but very shortly, to the cases in which this question has been decided; and it will appear, I apprehend, that the principle upon which the place of trial is removed is not simply and merely that an unprejudiced jury cannot be found, but, because a fair and impartial trial cannot be had in that county, adverting not alone to what might affect the jurors, in respect of partiality, but also embracing what might affect them upon a very different ground. Suppose the state of the county to be such that the jurors, whosoever they may be, must feel that, if they gave their verdict one way or the other, they could not live in peace and security in that county; is it to be said that a fair and impartial trial can be had there, where jurors are not at liberty to act, but at the peril of life or character, or of forfeiting the estimation of those amongst whom they live? Therefore I say, with great respect, that the question is not merely whether twelve honourable and impartial men can be found in the county, even if I were to admit, what the law does not suppose, that

men of a certain rank must be free from prejudice or partiality. That is not the manner in which the law views the case. Men of high rank and station may be just as susceptible of those other feelings to which I have adverted as other persons; they may feel that they cannot live in peace and security in the county, if they give that verdict which they might think it right to give. The rule of law, I take it, is not that, if you can find a certain number of honourable and impartial and unprejudiced men in the county, therefore the trial may be had and ought to be had there. No; but the rule of law is that, if you find such a state of circumstances upon the facts, as shows that a large portion of those persons who are usually called upon the jury for the trial of cases of this sort are placed under circumstances which make it presumable that they will be so affected by prejudice or partiality, or other sufficient causes, as to prevent them giving a fair and impartial verdict, the Court is warranted in removing the place of trial. Let us examine what is the nature of the affidavits upon which, in England, the rule is founded; and this is one of the reasons why I begin with the case with which I am about to begin, namely, *Hunt's case* (*a*). In that case, the affidavits upon which the motion was grounded stated that the indictment arose out of a supposed conspiracy, connected with a numerous meeting, held at Manchester, which had been dispersed by military, directed by Lancashire Magistrates. That amongst the military were men, the Manchester and Salford Yeomanry, the privates and officers of which consisted of opulent manufacturers and landed proprietors in Lancashire, and that a very great and general prejudice existed through the county of Lancashire, and amongst the persons who were likely to serve upon juries, as to the meeting and the objects of it, and the share the defendants took in it, so that they could not have a fair and impartial trial in the county of Lancashire. Now, in that county, there were between eight and nine thousand jurors empanelled; and might not the question be there put, which was put in this case? Is it possible to imagine, might it not have been said, that, amongst between eight and nine thousand jurors, there could not be found twelve fair and impartial men? and, if they could be

(*a*) 3 B. & Ald. 444.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

found, the Court ought not to remove the place of trial? but, if that was not a ground upon which the Court acted in that case, is it a ground upon which we can act in this? Here then, in a case decided in 1820, we have the Court acting, not upon the principle of its being possible to find twelve honest and impartial men, but upon the principle that there might be, from the state of the county, a large portion of the panel affected, and unfairly affected, by prejudice or partiality. The rule of law does not require it to be alleged that A or B, or any number of the jurors, are so affected, or will be so affected; but, if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the Court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county; for, as has been already well observed, this is not a rule to be carried out for the benefit of the Crown only. Under any such circumstances as those to which I have adverted, the Crown or the traverser would have an equal right to the same measure of justice. It is a wise and a jealous rule of law to guard the purity of justice, that it should be above all suspicion.

I come now to the alleged qualification of the rule for moving the venue; that it must be to the next adjoining county. In *Hunt's case*, the trial unquestionably *de facto* was removed to an adjoining county; but as I proceed I shall show that, in other cases, the trial was removed, not to the adjoining county, but to a remote and distant county. So early as the time of Charles the First, in *Fairwether's case*, to which I called attention in the course of the argument, it was certified to the Court, by Keeling the Clerk of the Crown, that there were divers precedents of such trials being had without the consent of the parties, and against "the will of the prosecutor, and in more remote counties." It is natural and proper to prefer the neighbouring county, upon the principle of convenience to all parties, on account of the witnesses, and to save trouble and expense; and the Court, therefore, generally selected the adjoining county. I admit that, in many cases, after *Fairwether's case*, the trial was removed to an adjoining county. But in several other cases

a distant county has been selected. Thus, in one case (*a*), it was removed from Nottingham to Kent. In *Waddington's case* (*b*), it was removed from Kent to London; and the reason assigned is peculiarly applicable to the present case. Lord Denman, C. J., in *Rex* v. *Holden* (*c*), says:—"I apprehend that the power of changing "the place of trial, whenever it is necessary for the purpose of "securing, as far as possible, a fair investigation, is a part of the "jurisdiction of this Court." In *Waddington's case*, the reason given for removing the trial was, "that the misdemeanor, which "was the subject of indictment, had prevailed extensively in the "county of Kent (*d*)," from which it was removed to London.

Now, upon adverting to the subject-matters of the present information, it appears as to one of them, namely, the existence of spiritual intimidation, to be an admittedly established fact, that, in almost every place of Roman Catholic worship in the county, the petition against the return of the sitting Members was read out by the Roman Catholic clergy from the altar, and commented upon as insulting to their clergy; and this is stated not only to have excited the indignation of the Roman Catholic congregations who heard it read, but also to have affected the Roman Catholic people generally, by reason of the imputation said to have been thereby cast upon their clergy; and was it not a natural ground for exciting their feelings? But whatever might have been the effect wrought upon the people generally, that effect must have been wrought amongst the congregations of the several clergymen, whom we must suppose to have weight with their own people: and is it to be said that a portion of the jurors of that county are to be the persons who shall be tempted or driven to exercise so difficult a task as working against those impressions or prejudices which would dispose them one way or other upon the trial of the cause? Some of them may be so adverse to the exercise of spiritual intimidation, that their anxiety to repress it might not leave them in a fair and impartial state of mind towards the traverser, so as

(*a*) *Sacheverell's case*, 10 Howell's State Trials, 30.
(*b*) 3 B. & Ald. 446. (*c*) 5 B. & Ad. 347, 354.
(*d*) 5 B. & Ad. 355.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

to enable them to give credit to the defence which might be set up upon his behalf; and, therefore, if we look to the exercise of the jurisdiction of the Court, in respect to the possibility of the traverser having a fair trial, under the circumstances of the case, even in this view of it, we are not in a condition to refuse this application.

Then the next question is, as to the right of this Court not only to remove the trial, but to remove it to such other indifferent county as the Court thinks right and convenient. The notice of motion in every one of the cases left it at large in this way, "*or any other county;*" and a notice of that sort would be idle, if the Court were bound to remove the trial into the next county. I have also before me the suggestion entered in the case of *The Queen at the prosecution of Crofton Vandeleur* v. *A. E. Kennedy*, in our own Court, for removing a criminal information from Clare to Cork, "because a fair and impartial trial of the issue cannot be had by a jury of the county of Clare;" and accordingly, it was so moved. The test is a test which applies not to the whole, but only to a part of the panel. The law says, if there be any considerable portion (and these are the words of Abbott, C. J., and Lords Denman and Campbell, C. Js.), if there be any considerable portion of the panel, which might reasonably be suspected of prejudice, then and in such case, the panel itself stands upon grounds, such as to make it the duty of the Court to remove the trial for the purpose of having a fair and impartial trial.

I purposely abstain from going further into an examination of the facts of this case, and I also purposely omit to advert to the grounds for the present ruling of the Court, which the traverser has himself laid by his indiscreet proceedings since the filing of this information, as I desire to abstain from everything which by possibility might prejudice the case, which will come before me in another way; I will, therefore, only say in conclusion, that I concur with both my Brethren upon the law of the case, and with my Brother CRAMPTON, that, in this case, there are facts which afford a solid foundation, according to the authorities, for the removal of the place of trial, because a fair and impartial trial cannot be had

in the county of Mayo. We shall, therefore, grant the application; and as the terms of the notice of motion are "to the county of Dublin, or such other county," &c., we shall select the county of Dublin.

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
CONWAY.

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NOTE.—The issue was tried before LEFROY, C. J., at the Sittings in the Queen's Bench after Hilary Term 1858; but the jury, not having agreed upon a verdict, were discharged.

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## THE QUEEN *v.* BREEN and others.*

E. T. 1858.
*April 24.*

An application for the return of informations, for the purpose of a motion to admit to bail, must be grounded on an affidavit.

HEMPHILL moved that the informations taken in this case might be returned into this Court, for the purpose of grounding an application to admit the prisoners to bail.—[O'BRIEN, J. Is your notice founded on an affidavit?]—This is only a preliminary motion, and I understand that an affidavit is not necessary.

O'BRIEN, J.

According to the practice of this Court, a motion like this must be grounded on affidavit. You may mention the matter again when you obtain the necessary affidavit.

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NOTE.—The affidavit in such cases should be sworn by the prisoner, or his attorney, and should state the charge upon which the prisoner is in custody—the place of custody—the application to the Coroner or Magistrates for admission to bail, and their refusal. It is also advisable to state upon what grounds the Coroner or Magistrates refused to admit the prisoner to bail.

* O'BRIEN, J., *solus*.

E. T. 1858.
*Queen's Bench*

## SAINTHILL *v.* EVANSON.

*May* 8.

To a writ of revivor of a judgment, recovered in 1844, the conusor pleaded, by way of equitable defence, that, before the commencement of the suit, the plaintiff assigned the judgment by deed to A and B, of which assignment the conusor received notice. No memorial of the assignment had been enrolled, pursuant to the 9 *G.* 2, c. 5 *(Ir.).—Held*, that this defence was no answer to the writ of revivor.

WRIT of revivor of a judgment in the Court of Queen's Bench, dated the 4th of April 1844. Defence, upon equitable grounds, that, after the rendition of the said judgment, and before the interest for the same, or any part thereof, became due, and before the commencement of this suit, the plaintiff, by deed, assigned the said judgment, and the said interest, when the same should become due, and all right, title and interest thereto respectively, to Albert Callanan and William Bowles Eames, of which assignment the defendant afterwards received due notice, and thereupon became and was liable to pay the said judgment and the interest thereon, to the said Albert Callanan and William Bowles Eames; wherefore the defendant saith, that the plaintiff ought not to have execution, as in the said writ prayed.

*W. A. Exham*, for the plaintiff, moved that the defence be set aside, upon the ground that the matters contained in it could not be pleaded as an equitable defence; or for liberty to file a replication, that the money secured by the judgment was trust money, and that the plaintiff was suing as trustee for the *cestuis que trustent* who were entitled to the said money. There is no averment in the defence that a memorial of the assignment of the judgment has been enrolled; and it is therefore necessary that the judgment should be revived by the plaintiff, whose name appears upon the judgment roll as conusee. The defence is bad at Law, by reason of the absence of this averment; and it is, for the same reason, bad as an equitable defence.

*Jellett*, contra.

It is conceded that if a memorial of the assignment of the judgment had been enrolled, the assignment would be valid, and the

assignees upon the roll would be the proper parties to sue upon the judgment: statute 9 *G.* 2, c. 5 *(Ir.)*: 25 *G.* 2, c. 14 *(Ir.)*. But as the assignment has not been duly enrolled, this case falls within the rules which govern the assignment of a *chose in action*, where the title of the assignee is perfected in Equity, by notice to the debtor: *Dearle* v. *Hall* (*a*).—[LEFROY, C. J. Are you not assuming that the assignment is complete, although the requisitions of the Act of Parliament have not been complied with?]—The assignment has not been perfected at Law; this case, therefore, is governed by the ordinary rules of Equity, independently altogether of the 9 *G.* 2, c. 5.—[LEFROY, C. J. It comes to this, does notice to the debtor enable a party to sue as assignee, although the judgment cannot be revived without the qualification derived from the Act of Parliament?]—The assignee of a judgment, even if a memorial of the assignment be not enrolled, pursuant to the statute, can sue in a Court of Equity, as in the case of any other *chose in action;* by reason of the notice, the defendant has become trustee of the judgment debt and interest for the assignees, and they are the only persons competent to give him a discharge. See the judgment of the Right Hon. F. Blackburne, in *In re Carew* (*b*). In *Boyle* v. *Ferrall* (*c*), Lord Campbell says:—"I am of opinion, that "the Act of the 9 *G.* 2 is a very salutary Act, because it makes these "judgments assignable, and very much facilitates these transactions "when money is borrowed upon the security of land; but such an "enactment as this was by no means necessary to give effect to an "assignment, because, as my noble and learned friend the Lord "Chancellor has stated, the assignee of the judgment may protect "himself effectually by giving notice to the conusor; and where "that is done, any subsequent payment by the conusor to the conu-"see would not be good as against the assignee."—[CRAMPTON, J. Do you think that if the defendant were to pay the judgment debt, under the order of a Court of Law, that he will be compelled to pay it a second time by a Court of Equity?]—The defendant is bound by the notice of the assignment; if he pays the debt to the conusor, he still remains liable to the assignees; they may perfect their title

(*a*) 3 Russ. 1; *and see* 2 White & Tudor, L. C., 2nd ed., p. 665.
(*b*) 4 Ir. Ch. Rep. 112, 117. (*c*) 12 Cl. & F. 740, 763.

E. T. 1858.
*Queen's Bench*
SAINTHILL
*v.*
EVANSON.

by enrolling the assignment, and they will then be in a position to revive the judgment (*a*). The defendant shows that the plaintiff is not the person entitled to receive the debt or interest, and that he must do by way of equitable defence. If the fact is, that the plaintiff is suing for other persons who are beneficially entitled, he can reply that fact.

LEFROY, C. J.

By notice to the plaintiff, you may cast upon him the responsibility which you apprehend. The plaintiff is the person upon the record who has the legal right to revive the judgment; you cannot deprive him of that legal right, unless you show it to be in another person. We must set aside the defence, with costs.

Ordered accordingly.

(*a*) 25 *G.* 2, *c.* 14 *(Ir.)*

## COLLIS *v.* PRENDERGAST.*

*May* 7.

An equitable defence, under the Common Law Procedure Act 1856, s. 85, must be such as requires nothing further to be done than to establish the facts contained in it, without the necessity of an account, or further proceeding.

THIS was an action of covenant for rent, upon an indenture of demise, by the heir of the lessor against the lessee, to which an equitable defence had been pleaded, appearing to involve an account.

*Pallas* moved to set aside the defence.

*H. Plunket*, contra.

CRAMPTON, J.

In this case accounts must be taken, and we have no officer in this Court by whom that can be done. You may have a good case

* CRAMPTON, J., *solus*.

E. T. 1858.
*Queen's Bench*
COLLIS
*v.*
PRENDERGAST.

or relief in the Court of Chancery; but an equitable plea in this Court must be a simple defence, requiring nothing further to be done than to establish the matter stated in the defence, and not requiring any account to be taken, or other thing to be done on foot of it. That is the doctrine of this Court.

I must grant the motion, with costs.

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## STUDDERT *v.* LEARY.

## STUDDERT *v.* TALTY.

T. T. 1858.
*June* 6, 12.

Where the plaint has not been duly indorsed with the date of service on the day of service, or on the day next thereafter, as required by the Common Law Procedure Act 1853, s. 31, the Court has not jurisdiction to supply the omission.

These cases were ejectments on title. The writs of summons and plaint had been duly served; but the process-server had omitted to indorse the date of service upon the writs within the time limited by the Common Law Procedure Act 1853, s. 31: the indorsements not having been made until the third day after the service had been effected. A consent for judgment had been given by the defendant in *Studdert* v. *Leary;* but no appearance had been entered or defence taken in *Studdert* v. *Talty.*

*E. Mayne* now applied for liberty to mark judgment in both cases, notwithstanding the above omission on the part of the process-server.

Lefroy, C. J.

The consent for judgment is a waiver of objection to the due indorsement of the writ of summons and plaint in the first case; but in the case *Studdert* v. *Talty*, in which no defence has been taken, we cannot contravene the Act of Parliament by supplying the omission.

H. T. 1858.
*Common Pleas.*

## WHELAN *v.* KEEGAN.

*(Common Pleas.)*

*Jan.* 14, 28.

A, a salesmaster, in Dublin, having dealings with B, received from C a letter of guarantee in the following terms, viz.:—"Sir, I hereby guarantee the payment of any amount of goods you may give to B, not exceeding £40 sterling." After the giving of the guarantee, dealings took place between A and B, in respect of which A received from B payments exceeding £40; but at the time of bringing the action, B owed A more than £40 on foot of subsequent transactions.—*Held*, that the foregoing document contained a continuing guarantee, and that A was entitled to recover to the extent thereof.

THIS was an action upon a guarantee, dated the 24th of November 1854, in the following terms, viz.: "Sir—I hereby guarantee the "payment of any amount of goods you may give to John Keegan, "of William-street, not exceeding £40 sterling." The defendant pleaded payment by the principal debtor. At the trial, at the last Kildare Summer Assizes, before the LORD CHIEF JUSTICE, it appeared that the plaintiff, who is a salesmaster, residing in Dublin, had, after the giving of the guarantee, sold to John Keegan, from time to time, cattle exceeding £40 in value, for which he had received payment; but the amount claimed was due to him by Keegan in respect of subsequent dealings. Counsel for the defendant called upon the LORD CHIEF JUSTICE to direct the jury that the guarantee was not a continuing one, but applied only to the first credit, to the extent of £40, given by the plaintiff, which had been paid off. On the other side, it was urged that it was a continuing guarantee. The LORD CHIEF JUSTICE, without ruling the point, directed a verdict for the plaintiff, reserving liberty to the defendant to move to enter a verdict, if the Court should agree with him on the construction of the contract. A conditional order having been obtained accordingly, cause was shown against making the same absolute, by—

*Macdonogh* (with whom was *J. A. Curran*), who contended that the terms of the guarantee were sufficient to embrace future credit to be given by the plaintiff to Keegan, until notice should be given by the defendant to determine his responsibility: ***Mason*** v. ***Pritchard*** (*a*); ***Mayer*** v. ***Isaac*** (*b*); ***Martin*** v. ***Wright*** (*c*).

(*a*) 12 East, 227. (*b*) 6 M. & W. 605. (*c*) 6 Q. B. 917.

*O'Driscoll* and *Nolan*, contra, contended that the guarantee was restricted to the first transactions, amounting to £40, between the parties: *Melville* v. *Hayden* (*a*); *Allnutt* v. *Ashenden* (*b*); *Nicholson* v. *Paget* (*c*); *Hitchcock* v. *Humfrey* (*d*); *Kirby* v. *The Duke of Marlborough* (*e*); *Hutchinson* v. *Boyd* (*f*).

*Curran*, in reply, cited *Bastow* v. *Bennett* (*g*); *Merle* v. *Wells* (*h*); *Horlar* v. *Carpenter* (*i*).

*Cur. ad. vult.*

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MONAHAN, C. J., now delivered the judgment of the Court.

*Jan.* 28.

This was an action upon a guarantee, tried before the Lord Chief Justice, at the last Assizes of the county Kildare. The plaintiff in this case is a salesmaster, residing in Dublin. The guarantee given by the defendant, upon which the action is brought, is dated 24th of November 1854, and is in the following terms:— "Sir, I hereby guarantee the payment of any amount of goods you "may give to John Keegan, of William-street, not exceeding £40 "sterling." It appeared at the trial that, subsequently to the giving of the guarantee, the plaintiff had, from time to time, sold to Keegan some cattle in the market, exceeding £40 in value, for which Keegan paid him; but that, before the bringing of the present action, there was a sum exceeding £40 due to the plaintiff from Keegan, on foot of their subsequent dealings; and then, the only question was, whether this was a continuing guarantee, or one limited to the first transaction between the parties? It is said, for the defendant, that the meaning of the document was, that the salesmaster should be at liberty to supply Keegan with goods, upon the defendant's responsibility, until the first £40 worth had been delivered, when the liability of the defendant was to be at an end. On the plaintiff's part, it is said that he was to go on supplying Keegan

(*a*) 3 B. & Al. 593.
(*b*) 5 M. & Gr. 392.
(*c*) 1 Cr. & M. 48.
(*d*) 5 M. & Gr. 559.
(*e*) 2 M. & S. 18.
(*f*) 6 Ir. Jur. 353.
(*g*) 3 Camp. 220.
(*h*) 2 Camp. 413.
(*i*) 27 Law Jour., N. S., C. P., 1.

H. T. 1858.
*Common Pleas.*
WHELAN
*v.*
KEEGAN.

with goods in the victualling line, and that the defendant was to be liable, at any time, during the course of dealings between the plaintiff and Keegan, for a sum not exceeding £40. The Lord Chief Justice, without deciding the question, directed a verdict for the plaintiff for £40, reserving liberty to the other party to have the verdict entered for him, in case they were of opinion that this was not a continuing guarantee. Upon referring to the cases on the subject, we find considerable difficulty in arriving at the true rule for the construction of documents of this description. In the case of *Mason* v. *Pritchard* (*a*), the Court of King's Bench decided, that the words of the guarantee must be taken as strongly, against the party giving it, as the sense admitted of. They acted upon that rule, both in that and in subsequent cases, without, however, in my opinion, being required to have recourse thereto for the purpose of deciding *Mason* v. *Pritchard*. There, they held that a guarantee to the plaintiff, for "any goods he hath, or may supply my brother W. P. with, to the amount of £100," was a continuing guarantee. In *Hargreve* v. *Smee* (*b*), Tindal, C. J., lays down the same rule as the King's Bench, and says that there is no reason for putting upon a guarantee a different construction from what the Court puts on every other instrument, namely, the Common Law rule that, if the party executing it leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself. On the other hand, in *Nicholson* v. *Paget* (*c*), Bayley, J., says, that "it "is the duty of the person who takes such a security, to see that it is "couched in such words as that the party so giving it may distinctly "understand to what extent he is binding himself." Here was a totally different rule of construction from that of the King's Bench. The Exchequer took time to consider their judgment, and seem to have expected that the rule so laid down by them would remove all further difficulty on the subject, and that it would govern all future cases. The result only shows how vain was the expectation; for, in the next case, *Mayer* v. *Isaac* (*d*), Parke, B., and Alderson, B., say that they do not approve of the rule laid down in *Nicholson*

(*a*) 12 East, 227.
(*b*) 6 Bing. 244.
(*c*) 1 Cr. & M. 52.
(*d*) 6 M. & W. 605.

v. *Paget*, by Bayley, B., and that the rule in *Mason* v. *Pritchard* was the preferable one; and they accordingly acted upon the latter rule. In another case in the King's Bench, *Melville* v. *Hayden* (*a*), Mr. Baron Bayley (then Justice) adheres to his own rule. Be that as it may, when that question arises, and the true meaning of the guarantee is not otherwise capable of being ascertained, it will be for the Court to decide, whether the reasoning of Lord Ellenborough and Tindal, C. J., and of the later Court of Exchequer, or that of the earlier Court of Exchequer, is the sounder. I will not lay down a rule on the subject, and am not anxious to do so, but would much rather that somebody else would lay down the rule, that the object of the Court should be to ascertain, without leaning to one side or the other, what is the meaning of the parties. In the present case, it is not necessary to lay down a rule one way or the other; for we are of opinion that there is not much difficulty in ascertaining what the intention of the parties was. The party taking this guarantee, and the one in whose favour it was given, were both tradesmen. If the guarantee had stopped with the words, "any amount of goods you may give," we could not, for one moment, hold that it was other than a general continuing guarantee, determinable only upon notice.

The next question is, whether the clause limiting the amount to £40 alters the construction of the previous part of the instrument? We think that the parties did not intend thereby to regulate the number of their dealings, but merely to put a limit in £. s. d. to the extent of liability under the guarantee; and therefore, even if this case were free from authority, we could entertain no doubt that the construction of the present instrument is, that it should not be confined to a single transaction. But we consider that this case is closed by authority, and that, in construing written instruments, as well as in determining abstract points of law, Courts must have regard to decisions in similar cases, by other Courts of co-ordinate jurisdiction. Some cases, to which we have been referred, are not distinguishable from the present; and even if we entertained a doubt as to the propriety of these decisions, we should consider it safer to adhere to rules already established, than to

(*a*) 3 B. & Ald. 593.

H. T. 1858.
*Common Pleas.*
WHELAN
*v.*
KEEGAN.

speculate on the intention of the parties. In ***Mason*** v. ***Pritchard***, the guarantee ran in these words:—"For any goods he ***hath***, or ***may*** supply my brother W. P. with, to the ***amount*** of £100." The Court held that it was a standing guarantee, to the extent of £100, which might, at any time, become due, for goods supplied until the credit was recalled. There is no distinction between that case and the present. Then, in ***Mayer*** v. ***Isaac***, the terms were:—"In consideration, &c., I hereby guarantee the "payment of any bills you may draw upon him on account thereof, "to the amount of £200." There, as in the previous cases, it was held to be a continuing guarantee; and the reasoning by which the Judges arrived at that judgment appear to my mind decisive. Alderson, B., says:—"It cannot be doubted that this is a conti- "nuing guarantee; it contemplates the continuance of a supply "on the one side, and, on the other, a liability for any default "during that supply; and then it defines the extent to which the "defendant will be bound upon this continuing or running guar- "antee, viz. £200."—Rolfe, B. "What is guaranteed is, payment "of ***any*** bills for the price of the goods supplied to him. ***Mason*** "v. ***Pritchard*** decides, that where it is for ***any goods*** supplied, it "is a continuing guarantee; and I cannot appreciate the distinction "taken between that case and the present." In ***Bastow*** v. ***Bennett*** (*a*), the form of the guarantee was, "I hereby under- "take and engage to be answerable, to the extent of £300, for "***any*** tallow or soap supplied by Mr. Bastow to France and Ben- "nett, provided they shall neglect to pay in due time."—Lord Ellenborough, C. J. "Without the word ***any***, it might perhaps "have been confined to one dealing to the amount of £300; but "as it is actually worded, I am of opinion, it remained in force "while the parties continued to deal on the footing established "when it was given." In ***Melville*** v. ***Hayden***, where the guarantee was, "I engage to guarantee the payment of A. M. to the "extent of £60, at quarterly account, bill two months, for goods "to be purchased by him of W. & D. M.," the Court was of opinion that the guarantee was confined to a single transaction;

(*a*) 3 Camp. 220.

and Bayley, J., whilst holding that it was so limited, did not question the decision in *Mason* v. *Pritchard*, in which the contrary was held. In *Nicholson* v. *Paget* (*a*), in which the words of the instrument were, "I hereby agree to be answerable for "the payment of £50, for E. L., in case E. L. does not pay for "the gin, &c., which he receives from you," the Court of Exchequer thought that the meaning of it was, that the defendant should pay to the extent of £50, only in respect of the first lot of goods. It may be questionable whether they were right in coming to the conclusion that the guarantee was confined to a single transaction; but Bayley, B., says that he did not question the authority of *Mason* v. *Pritchard*, and he distinguishes it upon grounds which do not apply to the present case. In another case to which we have been referred, *Allnutt* v. *Ashenden* (*b*), the guarantee only referred to a pre-existing account, and was therefore void within the Statute of Frauds. Mr. *Nolan* has also called our attention to the case of *Kirby* v. *The Duke of Marlborough* (*c*), which was an action of debt, upon a guarantee bond; but there, although the words of the condition would seem to be general, it contained the recital of a loan, and so the defendant could not be responsible for more than the first advance. In this case, therefore, without saying what ought to be the true rule of construction with regard to such instruments, but having regard to cases where similar instruments were held to be continuing guarantees, we must allow the cause shown against this conditional order.

Cause shown allowed.

(*a*) 1 Cr. & M. 68. (*b*) 5 M. & Gr. 392.
(*c*) 2 M. & Sel. 18.

H. T. 1858.
*Common Pleas.*

## FONBLANQUE and others *v.* LEE.

*Jan.* 21, 28.

The affidavit required by the 17 & 18 *Vic.*, c. 55, s. 1, to be filed with the Master of the Queen's Bench, upon the registration of every bill of sale, omitted the description of the residence and occupation of one of the attesting witnesses to the bill of sale.—*Held*, that the bill of sale was, by reason of such omission, rendered void, as against an execution creditor.

*Held also*, that such description must accompany every bill of sale so registered, whether executed by a person "under or in execution of any process," or by the owner of the goods.

THIS was an interpleader issue, to try whether certain goods, seized by the Sheriff of the county of Clare, under a writ of *fi. fa.*, at the suit of the defendant against Lord Dunboyne, were, at the time of the seizure, the property of the plaintiffs, who claimed them under a bill of sale executed by Lord Dunboyne, before the writ issued, and registered under 17 & 18 *Vic.*, c. 55.* At the trial, before MONAHAN, C. J., at the Sittings after last Michaelmas Term, an objection was taken on behalf of the defendant, the execution creditor, to the validity of the registry of the bill of sale, upon the ground that the affidavit required by section 1 of the statute,

* 17 & 18 *Vic.*, c. 55, intituled, "An Act for the Registration of Bills of Sale in Ireland (corresponding with the 17 & 18 *Vic.*, c. 36, in force in England)." Section 1 enacts:—"Every bill of sale of personal chattels, made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property or effects comprised in or made subject to such bill of sale; and every schedule or inventory, which shall be thereto annexed, or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the Master of the Court of Queen's Bench in Ireland, within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney to confess judgment in any personal action is now by law required to be filed); otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods, or any of them, are so comprised in such bill of sale, under the laws of bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all Sheriffs' officers and other persons seizing any property and effects comprised in such bill of sale, in the execution of any process of any Court of Law or Equity, authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property

which was made by Mr. Joynt, one of the witnesses, did not contain the residence and occupation of the second attesting witness to the bill of sale, and that it was consequently void as against the defendant. The LORD CHIEF JUSTICE, yielding to this objection, directed a verdict for the defendant, but reserved liberty for the plaintiffs to move to have a verdict entered for them upon the issue, if the Court should be of opinion that the point ought to have been ruled in their favour.

*R. Armstrong* (with whom was *Finch White*) showed cause, and contended that the words of the section required that, in all cases of registration of bills of sale, under the Act, the affidavit of perfection should contain a description of the residence and occupation of the attesting witnesses, and that the absence of such a statement in the present case avoided the registry: *Hatton* v. *English* (*a*); *Allen* v. *Thompson* (*b*); notes to *Twyne's case* (*c*); *In re O'Connor* (*d*); *Latimer* v. *Batson* (*e*).

*Fitzgibbon* and *Macdonogh*, contra, contended that the words in section 1, "and of every attesting witness to such bill of sale," should only be read in connection with the clause immediately antecedent, namely, "or in case the same shall be made or given by "any person under or in the execution of any process, then a "description of the residence and occupation of the person against "whom such process shall have issued," &c. The 3rd section and schedule, which relate to the mode of registration, are silent about the attesting witnesses. The transaction, being *bona fide*, ought to

(*a*) 7 El. & Bl. 94.
(*b*) 1 H. & N. 15.
(*c*) 1 Sm. L. C. 1.
(*d*) 1 Ir. Jur., N. S., 198.
(*e*) 4 B. & C. 652.

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in, or right to the possession of, any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued, under or in execution of which such bill of sale shall be made or given, as the case may be."

H. T. 1858.
Common Pleas.
FONBLANQUE
v.
LEE.

be upheld, if the language of the Act of Parliament admitted of such a construction: *Hubbard* v. *Johnstone* (*a*).

*F. White* replied.

*Cur. ad. vult.*

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MONAHAN, C. J., now delivered the judgment of the Court.

*Jan.* 28.

This was an interpleader issue, tried before me at the Sittings after last Term. The question was, whether certain household furniture and other property, taken in execution by the Sheriff of the county Clare, under a writ of *fieri facias*, at the suit of the defendant Lee against Lord Dunboyne, were the goods of the plaintiffs, so as to prevent their being taken in execution as the goods of Lord Dunboyne? The goods had been originally the property of Lord Dunboyne, and were at the time of the issuing of the execution, and still are, in his residence in the county Clare. The plaintiffs claimed to be entitled to them under a bill of sale, executed by Lord Dunboyne, on the 11th of April 1857, to the plaintiffs, who are the trustees of his marriage settlement, the consideration of the bill of sale being a loan of £999. 16s. An attempt was made at the trial to impeach the bill of sale, as not being *bona fide*, and as being merely colourable; this case altogether failed, and the only question then was, whether the bill of sale, or a copy thereof, was duly filed with the Master of the Queen's Bench, as required by the 17 & 18 *Vic.*, c. 55? It was not disputed that the bill of sale in question was one requiring to be filed under that Act. On production and proof of the bill of sale, it appeared to have been witnessed, as to the execution thereof, by Lord Dunboyne, by William Lane Joynt, solicitor, 82 George's-street, Limerick, and Robert Bonynge, J. P. (I suppose Justice of the Peace), Stanner Park, Ennis.

A correct copy of this bill of sale was filed with the Master of the Queen's Bench, on the 22nd of April 1857; and attached thereto was an affidavit, made by the attesting witness Mr. Joynt, describing himself as solicitor, and resident at 82 George's-street, Limerick,

(*a*) 3 Taunt. 220.

and stating that he is an attesting witness to said bill of sale, and that he saw the same executed, the day it bears date; but not taking any notice of the second attesting witness, Mr. Bonynge. It was objected, on behalf of the execution creditor, Mr. Lee, that the bill of sale was void as against him, inasmuch as neither the affidavit, nor anything else filed with the bill of sale, contained a description of the residence and occupation of Mr. Bonynge, the second attesting witness; and that the statement of his residence and occupation, on the copy of the attestation annexed to or part of the bill of sale, did not remove the objection. I was of opinion, at the trial, that the objection to the bill of sale was well founded, and directed a verdict for the defendant Mr. Lee, reserving liberty for plaintiffs to apply to have the verdict entered for them. The case has been fully argued before us. We entertain no doubt that, in those cases in which the statute requires a description of the residence and occupation of the attesting witnesses to be filed, such must be given in an affidavit or other document, distinct from, and not part of, the bill of sale itself; for this, the case of *Hatton* v. *English* (*a*) is a distinct authority. In that case, the bill of sale filed in the Court was made between Joseph Hare, of No. 11 Clarges-street, Piccadilly, lodging-house keeper, and the plaintiff, of the other part; but the affidavit accompanying it contained merely a statement as to the time of the execution of the bill of sale, but nothing as to the residence or occupation of the grantor. The Court held that the bill of sale was void, and that the Act required a description of the residence and occupation of the party to be filed, separate and distinct from the bill of sale itself; and, as it is part of the corresponding clause, which in the same words requires the description of the residence and occupation of the attesting witnesses, no doubt, the same rule must apply to both cases. This was scarcely questioned by the plaintiffs' Counsel, Mr. *Fitzgibbon;* but he insisted that, according to the true construction of the Act, it only required a description of the residence and occupation of the attesting witnesses to be filed when the bill of sale was executed by a Sheriff or other officer, under a writ of execution or other legal process, and not when the bill of sale is

(*a*) 7 E. & B. 94.

executed by the owner of the goods. This of course must depend on the words of the 1st section, which, leaving out unnecessary words, is as follows:—"Every bill of sale and every schedule thereto "annexed, or a true copy thereof, and of every attestation of the "execution thereof, shall, together with an affidavit of the time of "such bill of sale being made or given, and a description of the "residence and occupation of the person making or giving the "same; or, in case the same shall be made or given by any person, "under or in execution of any process, then a description of the "residence and occupation of the person against whom such process "shall have issued, and of every attesting witness to such bill of "sale, be filed with the Master of the Queen's Bench, otherwise "such bill of sale shall be void, as against certain parties." Now, it is clear that, to give any reasonable construction to the portion of this clause relating to bills of sale, executed by the owners of goods, it will be absolutely necessary to read the clause as if the part relating to bills of sale, executed by officers under legal process, was included in a parenthesis; and the only question is, how much is to be so included? The plaintiffs' Counsel contend that you are to include within the parenthesis the entire residue of the clause, down to the words "be filed." If this reading of the statute be adopted, the result will be, that when the bill of sale is executed by the owner of goods, the affidavit must contain the time of the execution of the bill of sale, and the description of the residence and occupation of the grantor, but that it is not necessary to give any information as to the residence or occupation of the attesting witnesses, whether contained in the deed itself or not; but, when the deed is executed by the Sheriff or other officer, under legal process, that you are to give not only the residence and occupation of the person against whom such process issued, but also those of the attesting witnesses to the execution of the bill of sale by the Sheriff. This, certainly, would be extraordinary legislation; the object of requiring the residence and occupation of the witnesses must be to give the creditors impeaching the bill of sale an opportunity of considering its fairness, and of inquiring of the attesting witnesses or the subject of its execution; and that this should be considere

necessary, in the case of the execution of the deed by the Sheriff, whom one would be disposed to consider indifferent between the parties, and not when it was executed by the owner of the goods, I cannot understand. On the other hand, the construction contended for by the defendant is, that every bill of sale, no matter by whom executed, when filed, shall be accompanied by an affidavit, containing the time of the execution and the description of the residence and occupation of the person making the same; or, if made by the Sheriff, then of the person against whom the process issued; that is, in other words, of the owner of the goods; so that, in all cases, what is to be filed is the description of the owner of the goods, and also of the attesting witnesses to all such bills of sale. Such, we think, the fair meaning of the words in the latter part of the clause, viz., "and of every attesting witness to such bill of sale." "Such bill of sale," we think, has the same meaning here as the same words bear in the earlier part of the clause, with respect to the time of such bill of sale being made or given. The meaning of the clause, as to bills of sale executed by Sheriffs, is not that the party registering is, at his option, to give the description of the Sheriff, or of the party whose goods are sold; he is bound to give the residence and occupation of the person whose goods were sold by the Sheriff, as in ordinary cases; he is also bound to give the residence and occupation of the grantor of the bill of sale; and the information to be given, in relation to the attesting witnesses, and time of execution, applies to both. This is the view of the case I took at the trial, not being then aware that the question had arisen or been discussed. We have been referred to the case of *In re Arthur O'Connor* (*a*), in which Judge Macan held that, in a case like the present, the residence and occupation of the attesting witness should have been given. And though, in that case, there was also an objection to the description of the grantor in the bill of sale, still it appears, from his judgment, that he considered it clear that the construction of the statute was that contended for by the defendant Mr. Lee. Since the argument, we have been referred to the case of *Blackwell* v. *England* (*b*), decided by the Queen's Bench, and *Attenborough* v.

(*a*) 1 Ir. Jur., N. S., 198. (*b*) 3 Eng. Jur., N. S., 1302.

H. T. 1858.
*Common Pleas.*
FONLBANQUE
*v.*
LEE.

*Thompson* (*a*).—[His Lordship briefly referred to these decisions].—It is impossible to read these cases without coming to the conclusion that the learned Judges of these two Courts considered it clear that, in *all* cases of bills of sale, the Act required the residence and occupation of the attesting witnesses to be stated, as well as of the party to the bill of sale. It has been stated, that a great number of the bills of sale filed in the Queen's Bench are liable to the same objection; even if this be so, it cannot alter our decision, the statute being too recent to allow the practice of the office to give it a construction; besides, the English Act of the same Session is precisely in the same words. Approving as we do of the construction put upon the statute by the English Judges, we cannot adopt a different one, on the ground of any alleged practice here. Mr. *Fitzgibbon*, who very strenuously argued that, even though the construction contended for by the defendant Mr. Lee was the right one, still, that as it was obscure, we should not adopt such an obscure construction so as to defeat the rights of honest creditors under *bona fide* bills of sale; and he, on that point, referred us to the case of *Hubbard* v. *Johnstone* (*b*). We do not doubt the propriety of that decision; but we are of opinion it does not apply to the present case. We do not think the construction contended for by the defendant obscure or forced; we think it the natural construction of the words used, and the only one consistent with the object and policy of the Act; and therefore we must hold that the verdict is right, and that the view I took at the trial is the correct one.

Cause shown allowed.

(*a*) 3 Eng. Jur., N. S., 1307.

(*b*) 3 Taunt. 220.

M. T. 1857.
*Common Pleas.*

## GILMAN *v.* CROWLY.

*Nov.* 21, 23,

The word "release," in the proviso of 8 & 9 *Vic.*, c. 106, s. 3, is to be construed as bearing its ordinary meaning, and therefore, under the provisions of that statute, every lease, required by law to be in writing, must be made by deed.

THIS was an action of ejectment upon the title, brought for the recovery of part of the lands of West Inch, in the county of Cork, and tried before Mr. Justice BALL, at the Summer Assizes for that county, on the 29th of July 1857. The plaintiff, Thomas Gilman, had purchased from his nephew, John Gilman, his interest in the lands, being a term of three lives, still subsisting, and forty years in reversion; but the deed of assignment under which the purchase was effected, and which was executed in the year 1850, and duly registered, contained an exception of all leases and agreements for leases then subsisting. Notice to quit, which had expired before the bringing of the present action, had been served by the plaintiff upon the defendant, who had been in possession of portion of the assigned premises, as tenant to John Gilman, the former owner. The defendant relied upon the following instrument:—"A memo-"randum of an agreement between John Gilman, Esq., of Inch, and "Cornelius Crowly, of Dunneens, farmer, showeth, that the said "John Gilman, Esq., doth let unto the said Cornelius Crowly that "part of the lands of Inch late in the possession of the said John "Gilman, Esq., and formerly held by M. Donovan (and others), in "as large a manner as they held it, at the yearly rent of £70 "sterling, to be paid by two payments, on every 29th day of Sep-"tember and 25th day of March; the first payment thereof to be "made on the 29th day of September next, subject to the rates and "taxes as between landlord and tenant; the said Cornelius Crowly "to pay the said John Gilman the sum of £30 sterling now in "hand, and £5 sterling on the 1st of May next; which £35 "the said Cornelius Crowly is to be allowed the last year, when "going out; the term to be thirty-one years, and a release to be

I. T. 1857.
Common Pleas.
GILMAN
v.
CROWLY.

"perfected at the request of the said Cornelius Crowly. Given "under our hands this 22nd day of December 1849.

"JOHN GILMAN.

"Present—J. CROWLY. "CORNELIUS CROWLY."

This instrument bore no seal, nor had it been registered; and the plaintiff's Counsel contended, upon these grounds, that, under the provisions of 8 & 9 *Vic.*, c. 106, s. 3, it did not amount to a lease, and was void as against the deed of assignment, and that therefore the defendant had been only a tenant from year to year; but the learned Judge directed a verdict for the defendant, reserving leave to the opposite party to move to have it turned into a verdict for the plaintiff, if the Court above should be of opinion that the document was void, as against the assignment to the plaintiff, upon the grounds of the want of a seal or non-registration.

A conditional order for that purpose having been obtained—

*J. Clarke* (with whom was *Chatterton*) showed cause.

The sole question in this case is upon the construction of the proviso in s. 3 of 8 & 9 *Vic.*, c. 106, viz., "provided also that "the said enactment, so far as the same relates to a *release* or a "surrender, shall not extend to Ireland." The word "release" has been, by all the text-writers upon the subject, construed to mean "lease," the word "release" having been inserted by mistake; the reason of this construction being, that the word "release" is not used in the former part of the section.—[BALL, J. But, supposing that it was a mistake for "lease," the question is, can we rectify it?—MONAHAN, C. J. It is very evident that the Legislature meant "lease," from the position of the words in the enacting part of the section and the proviso; but it is the Legislature alone that can correct that error.]—In construing an Act of Parliament, the intention of the Legislature must be regarded: *Rex* v. *Longmead* (*a*). He also cited *Clooney* v. *Watson* (*b*).—[KEOGH, J. Perhaps, on reference to the Parliament roll, it may be discovered that the word is not "release" in the original.]

(*a*) 2 Leech, Cr. Cas., 694. (*b*) 2 Ir. Com. Law Rep. 58.

*Copinger* and *Sullivan*, contra.

*Rex* v. *Longmead* was a decision upon the construction of two similar Acts of Parliament, and therefore distinguishable; but the true principle of construction is, that statutes must be interpreted according to the meaning of the words used by the Legislature: *per* Willes, C. J., in *Smith* v. *Parkhurst* (*a*); *Lord Clanricarde's case* (*b*); *Vattel's Law of Nations*, book 2, p. 285; *Dwar. on Stat.*, p. 556; *Pray* v. *Edie* (*c*), *per* Lord Mansfield; *Bac. Abr.*, *Stat.* The word "release" is explained, as bearing its natural meaning, in *Sug. Ven. & Pur.*, 13th ed., p. 98, by reference to the preceding section, which treats of releases. In the construction of private instruments, the intention of the parties may be taken into consideration; but the strict meaning of the words must be followed in Acts of Parliament: *per* Pollock, C. B., in *Miller* v. *Salomons* (*d*); *Com. Dig.*, *Parliament*, R, 10 *a*; *Rex* v. *The Justices of Bucks* (*e*); *Rex* v. *Scott* (*f*); *The Attorney-General* v. *The Glass Plate Co.* (*g*); *Collins* v. *Hungerford* (*h*); *The Sussex Peerage case* (*i*), *per* Tindal, C. J. The copy of a statute, published by the Queen's printer, is evidence; and therefore it is unnecessary to refer to the Parliament roll.

*Chatterton*, in reply.

The words of a statute cannot be construed so as to be insensible, which will be the result, unless this word be interpreted to mean "lease," there being no reference to a release in the preceding part of the enactment; and, besides, to give it its natural meaning will be most dangerous, the statute having been generally acted upon as though the word were "lease:" *Shelford, Real Prop.*, p. 521.—[MONAHAN, C. J. We have no doubt as to the intention of the Legislature; but we hope that the mistake may not exist in the Parliament roll; or, perhaps, a short Act of Parliament may be brought in to remedy the error.]

*Cur. ad. vult.*

(*a*) 3 Atk. 136.
(*b*) Hob. 277.
(*c*) 1 T. R. 313.
(*d*) 7 East, 559, 560.
(*e*) 2 Mau. & Sel. 230.
(*f*) 3 T. R. 603.
(*g*) 1 Anst. 39.
(*h*) 2 Ir. Jur., N. S., 519.
(*i*) 11 C. & Fin. 143.

H. T. 1858.
*Common Pleas.*
GILMAN
*v.*
CROWLY.
*Feb.* 1.

MONAHAN, C. J., delivered the judgment of the Court.

This case was tried before my Brother BALL, at the last Summer Assizes for the county of Cork; it was an action of ejectment on the title, brought by the plaintiff, for the purpose of recovering the possession of certain premises in that county. The plaintiff founded his title upon a conveyance of the lands to him from another party, and a notice to quit, which had been regularly served upon the defendant, who, it was alleged, was tenant from year to year. There was no question as to the commencement of the defendant's tenancy; and the only question in the case is in reference to the effect of a certain written instrument relied upon by the defendant, which he produced at the trial, and contended that its legal operation amounted to a demise of the premises to him, for a term still subsisting, and therefore that his title was not affected by the notice to quit.

It was admitted, that the property had been conveyed to the plaintiff, subject to the rights and interest of the defendant; and therefore the only question was, whether this document, which purported, as to its legal operation, to amount to a demise of the premises, did operate so as in fact to be a lease of the premises? The objection to such a construction of the instrument was that, under the statute of 8 & 9 *Vic.*, c. 106, s. 3, this document, purporting to be a lease, and having been executed subsequent to the passing of that statute (August 4th 1845), should have been under seal, in order to be of any validity as a lease. The 3rd section of that statute enacts:—"That a feoffment, made after the 1st of October 1845, "other than a feoffment made under a custom by an infant, shall be "void at law, unless evidenced by deed; and that a partition, and "an exchange of any tenements or hereditaments, not being copy-"hold, and a lease, required by law to be in writing, of any tene-"ments or hereditaments, and an assignment of a chattel interest, "not being copyhold, in any tenements or hereditaments, and a sur-"render in writing of an interest in any tenements or hereditaments, "not being a copyhold interest, and not being an interest which "might by law have been created without writing, made after the "said 1st of October 1845, shall also be void at law, unless made by

"deed: provided always that the said enactment, so far as the same "relates to a release or a surrender, shall not extend to Ireland." Now, the only question is, what is the operation of this document, it not being under seal? This is a general statute, extending to England and Ireland, and it contains a proviso relating to certain documents, and providing that, as to them, the enactment should not extend to Ireland; and there is nothing in the previous sections or portions of the Act to which these words can be applicable.

It is probable that the word "release," in the proviso, did come into the Act by mistake for the word "lease;" and we would be anxious to redress such a mistake, if we could do so upon any legal principle or authority, by reading "lease" for "release," as we have no doubt it was so intended. But independently of any other difficulty, we find that the previous part of the section requires that three several species of instruments should be evidenced by deed—I allude to leases, assignments and surrenders: and there is nothing to show, even though we were of opinion that something else was intended by the word "release" in the proviso, whether that word is to be construed as meaning "lease," or "assignment," or "surrender," except merely the similarity between the words "lease" and "release." We must, therefore, give the word "release" its ordinary meaning; but, nevertheless, we are anxious that this instrument, upon which the tenant founds his claim, should have effect; and although we do decide against him in accordance with the rule of Law, we trust, nevertheless, that he may be able to obtain redress in a Court of Equity.

We cannot alter the Act of the Legislature, by rejecting or substituting words merely on account of a similarity, and, therefore, we must direct a verdict to be entered for the landlord; but as the Judge below directed a verdict for the defendant, our order will be made without costs; and we shall respite execution for a fortnight, in order that the tenant may, if he think fit, institute proceedings in a Court of Equity.

Rule absolute to enter a verdict for plaintiff.

E. T. 1858.
*Common Pleas.*

## M'DOWELL *v.* WHEATLY and another.

*May* 3, 4, 8.

The affidavit required by the 13 & 14 *Vic.*, c. 29, s. 6, to be made by the party seeking to render a registered judgment, decree, order or rule to operate as a mortgage, merely alleged that a "certain order had been duly registered in the office for registering judgments in Ireland, against J. S., by the name and description of J. S., of C., in the county of T., Esq., M. P.," without making any positive statement as to the "usual or last known place of abode, and the title, trade or profession" of J. S.—*Held*, that the omission of such averments rendered the registration of the order as a mortgage null and void.

THIS was an action of ejectment upon the title, brought by the plaintiff George M'Dowell, Esq., the official manager of the Tipperary Joint-stock Bank, by order of the Commissioners of the Incumbered Estates Court, for the recovery of the lands of Kilconnell and part of the lands of Cunaghtarsna, in the barony of Middlethird and county of Tipperary, and also of the lands of Coolnamuck, in the barony of Upperthird and county of Waterford, &c.; and by order of the said Court the following special case was stated:—

The special case stated the formation of the Tipperary Joint-stock Bank, under the 6 *G.* 4, c. 42, and the subsequent Irish Bankers Acts. That, it having stopped payment, an order for winding up was made on the 4th of March 1856, at the Rolls, under the provisions of the Joint-stock Companies Winding-up Acts 1848 and 1849. That Master Murphy, to whom the matter was referred, by an order, dated the 17th of March 1856, appointed the plaintiff official manager of said Bank; that the list of contributories was settled, and that James Sadleir was placed thereon as the holder of 1738 shares. That, on the 9th of June 1856, the Master peremptorily ordered that a call of £40 per share should be made on all the contributories of the Company, named in the schedule annexed, and that each of said contributories should pay to the plaintiff, as such official manager, on the 12th day of July 1856, at his office, No. 17 Lower Ormond-quay, Dublin, the balance, if any, which should be due from him or her, after debiting his or her account in the Company's books with the amount of such call; to which order was annexed a schedule, containing, amongst others, the name of James Sadleir, of Clonacody, Clonmel, in the county of Tipperary, Esq., M. P., as a contributory in respect of 1738 shares in said Company. That on the 27th of June 1856, a copy of said order, together with

a copy of the account of said James Sadleir, from the books of the Bank, was served upon said James Sadleir; the balance of which account, after debiting the said James Sadleir with £69,520, the amount of said call, and crediting him with £4370. 18s. 9d., which appeared to his credit in the Bank books, was £65,149. 1s. 3d. That after the requisite preliminaries had been gone through, on the 25th of August 1856, Master Murphy made the following order, viz.:—

"Master's Office, Four Courts, 25th August, 1856.

"In the Matter of the Joint-stock Companies Winding-up Acts
"1848 and 1849, and of the Tipperary Joint-stock Bank.

"I, Jeremiah J. Murphy, the Master of the High Court of Chan-
"cery, charged with the winding up of this Company, order that
"James Sadleir, one of the contributories of this Company, do,
"within fourteen days after the service hereof, pay to George
"M'Dowell, Esq., the official manager of the Company, at the office
"of the said official manager, 17 Lower Ormond-quay, Dublin, the
"sum of £65,149. 1s. 3d., such sum being the balance now appear-
"ing due from the said James Sadleir, on his account with the said
"Company. (Signed) "J. J. MURPHY."

That service of said order upon James Sadleir was effected in the mode required by the Winding-up Acts, on the 3rd of September 1856; that on the 15th of October 1856, said order of the 25th of August 1856 was registered in the office for registering judgments in Ireland. That James Sadleir has not paid any portion of the sum of £65,149. 1s. 3d. That on the 3rd of November 1856, the plaintiff made an affidavit, for the purpose of registering said order as a statutable mortgage upon the estate of James Sadleir, of which the following is a copy:—

"IN THE COURT OF CHANCERY.

"In the Matter of the Joint-stock Companies Winding-up Acts
"1848 and 1849, and of the Tipperary Joint-stock Bank.

"George M'Dowell, of Herbert-street, in the city of Dublin, a
"Fellow of Trinity College, Dublin, and official manager of the
"Tipperary Joint-stock Banking Company, having his office or
"place of business, as such official manager, at No. 17 Lower

1858. Pleas. WELL v. ATLY.

"Ormond-quay, Dublin, maketh oath and saith that, by an order "made in this matter, by Jeremiah John Murphy, Esq., the Master "of the High Court of Chancery in Ireland, charged with the "winding up of this Company, bearing date the 25th day of August, "in the year of our Lord 1856, it was ordered that James Sadleir, "one of the contributories of this Company, should, within fourteen "days after the service thereof, pay to deponent, as official manager "of said Company, at the office of this deponent, No. 17 Lower "Ormond-quay, in the city of Dublin, the sum of £65,149. 1s. 3d., "such sum being the balance then appearing due from the said "James Sadleir, on his account with said Company, as appears by "said order: saith, said order has been duly registered in the office "for registering judgments in Ireland, *against the said James "Sadleir, by the name and description of James Sadleir, of Clon-"acody, Clonmel, in the county of Tipperary, Esq., M.P.* Depo-"nent further saith that, to the best of his knowledge and belief, the "said James Sadleir is, at the time of swearing this affidavit, seised "or possessed at Law or in Equity, of, or has disposing power, "which he may, without the assent of any other person, exercise for "his own benefit, over certain lands, tenements, hereditaments and "premises hereinafter mentioned; that is to say, the lands of Kil-"connell," &c., &c.—[Setting out the sundry denominations of land, the fee-simple estate of James Sadleir.]—"And deponent saith, "that said sum of £65,149. 1s. 3d., so secured by said order as "aforesaid, still remains justly due and owing to this deponent, as "such official manager; and deponent saith, said order is still in full "force, virtue and effect in law.—Sworn," &c., &c.

That said affidavit was filed in the office of said Master Murphy, on the file of proceedings on said winding-up matter. That on the 7th of November 1856, an office copy of said last-mentioned affidavit was registered in the registry of deeds office in the city of Dublin, as a statutable mortgage, against the lands and premises described in the plaint in this action, being the property of the said James Sadleir.

The special case then stated the proceedings in the Incumbered Estates Court, by the plaintiff, to have a sale of the premises, for th

discharge of the incumbrances affecting same; and that after a sale had taken place on the 27th of July 1857, the final schedule was brought into the Incumbered Estates Court; and it having been objected that the aforesaid order of Master Murphy was not capable of registration as a statutable mortgage, Mr. Commissioner Longfield directed the plaintiff to proceed by action of ejectment at Law for the recovery of the lands comprised in said petition, and to settle a special case in such action, for the purpose of taking the opinion of this Court upon the question of the sufficiency and validity of the registration, as a statutable mortgage, of said order and affidavit.

The question to be decided by this Court was as follows, viz.:—whether the said order of the 25th of August 1856, so registered as aforesaid, operated, pursuant to the statute 13 & 14 *Vic.*, c. 29, to transfer to, and vest in, the plaintiff, the lands in the ejectment mentioned? If it did so operate, then judgment is to be given for the plaintiff. If it did not so operate, then judgment is to be given for the defendants.

*E. B. Lawless* (with whom was *D. Lynch*), for the plaintiff.

The order of the 25th of August 1856 was capable of being registered as a charge affecting lands, under the 3 & 4 *Vic.*, c. 105, s. 27, and is accordingly capable of being registered as a judgment mortgage, under 13 & 14 *Vic.*, c. 27, s. 6: *Ex parte Connell* (*a*); *Ex parte Thomas* (*b*); *In re Robinson's Executors* (*c*); *Wells* v. *Gibbs* (*d*); *Beaufort* v. *Phillips* (*e*); *Lee* v. *Green* (*f*); 11 & 12 *Vic.*, c. 45 ss. 12, 14, 22, 29, 66, 67, 74, 76, 83, 86, 87, 88, 89, 93, 95, 108; schedule forms, No. 11, 15; 12 & 13 *Vic.*, c. 108.

*Sir C. O'Loghlen* and *D. C. Heron* (with whom was *Owen*), contra.

This order is incapable of registration. The form of the order is erroneous; it ought to follow the form in schedule No. 15, instead of No. 11. It is not absolute, but is to become so, in a particular

(*a*) 2 Jur., N. S., 390.
(*b*) 9 C. B. 740.
(*c*) 6 De G., M'N. & G. 572.
(*d*) 3 Beav. 399.
(*e*) 1 De G. & Sm. 321.
(*f*) 6 De G., M'N. & G. 155.

E. T. 1858. *Common Pleas.*

M'DOWELL *v.* WHEATLY.

event; it therefore wants the finality which is essential to a judgment. It was therefore incapable of registration as a charge: *Chadwick* v. *Holt* (*a*); *Wells* v. *Gibbs* (*b*); *Jones* v. *Williams* (*c*); *Hoops* v. *Kingston* (*d*); *Arch. Pr.*, by *Chitty*, last ed., p. 1496; *Jones* v. *Williams* (*e*). Assuming, however, that this order could be registered as a mortgage, the registration itself is defective. The affidavit does not pursue the requirements of the 13 & 14 *Vic.*, c. 27, s. 6, as it omits a statement of the usual or last known place of abode, and the title, trade or profession of James Sadleir, the party whose estate is to be affected by the registration. The only statement is by way of recital of the mode in which the order had been previously registered. The registration of bills of sale, under the Acts in force for that purpose in England and Ireland, has been held defective for the want of the statement of certain particulars in the affidavit filed at the time of the registry: *Fonblanque* v. *Lee* (*f*); *Re O'Connor* (*g*); *Re Ferrall* (*h*); *Allen* v. *Thompson* (*i*); *Attenborough* v. *Thompson* (*k*); *Danl. Ch. Prac.*, by *Headlam*, suppt., p. 138.

*Lynch* replied.

*Cur. ad. vult.*

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MONAHAN, C. J., now delivered the judgment of the Court.

*May* 8.

This case comes before the Court in the form of a special case, stated by consent of the parties, in pursuance of an order of the Commissioners of the Incumbered Estates Court, by whose direction an ejectment upon the title was brought by the official manager of the Tipperary Joint-stock Bank, for the recovery of certain denominations of land, the estate of James Sadleir. The case states the

(*a*) 2 Jur., N. S., 918; S. C., 26 Law Jour., Chan., 77.

(*b*) 3 Beav. 399.

(*c*) 8 M. & W. 349; S. C., 9 Dowl. P. L. 702.

(*d*) 11 Ir. Eq. Rep. 469. (*e*) 11 Ad. & El. 175.

(*f*) 2 Jur., N. S., 224; S. C., *ante*, p. 550.

(*g*) 1 Ir. Jur., N. S., 198. (*h*) 7 Ir. Jur. 307.

(*i*) 1 H. & N. 15. (*k*) 2 H. & N. 559.

establishment of the Tipperary Bank, its suspension of payment, the appointment by Master Murphy of Mr. M'Dowell as official manager of the Company, under the Winding-up Acts, and his acting as such; the making of an order for the payment of a call of £40 per share upon the contributories; that James Sadleir was the owner of 1738 shares in the concern; that, by a subsequent order, James Sadleir was required, within fourteen days after the service thereof, to pay to Mr. M'Dowell, the official manager, at his office, 17 Lower Ormond-quay, the sum of £65,149. 1s. 3d., being the balance appearing due from Sadleir to the Company; and that an affidavit was afterwards made and filed in the office of Master Murphy, for the purpose of having an office copy of such affidavit registered in the office for the registration of deeds, so as to charge the estate of Sadleir with the amount of the order, and so to make it a *quasi* mortgage deed. It has been argued that this order, even though duly registered, could not have had the effect of a mortgage or charge upon the lands, because it was not an order for the payment of money immediately or on a certain day, but on the occurrence of an event which might or might not happen, namely, the service of the order on James Sadleir. It was also contended that there was an error in the proceedings, because the affidavit was not filed in the affidavit office of the Court of Chancery, but in the office of Master Murphy, which, it was contended, could not be considered as a portion of the Court of Chancery. Other objections were also taken, upon none of which do we give any opinion, because we are of opinion that the objection taken to the form of the affidavit is well founded, and that the registry is therefore defective.

The Act of Parliament on which the question depends is the 13 & 14 *Vic.*, c. 29; and, by section 6 of that statute, it is provided, in the following words, that, "It shall be lawful for such creditor, at "any time, &c., to make and file in the Superior Court in, by or "into which such judgment, rule or order is entered up, made or "removed, or in the Court of Equity by which such decree or order "is made, or in the case of such order in bankruptcy or lunacy as "aforesaid, in the Court of Chancery in Ireland, an affidavit stating "the name or title of the cause or matter, and the Court in which

E. T. 1858.
*Common Pleas.*
M'DOWELL
*v.*
WHEATLY.

"such judgment, decree, order or rule has been entered up, obtained "or made, and the date of such judgment, decree, order or rule, and "the names, and the usual or last known place of abode, and the "title, trade or profession of the plaintiff (if there be such), and of "the defendant or person whose estate is sought to be affected by "the registration, as hereinafter mentioned, of such affidavit, and "the amount of the debt, damages, costs or moneys recovered, "or ordered to be paid by such judgment, decree, order or rule; and "stating that, to the best of the knowledge and belief of the depo-"nent, the person against whom such judgment, &c., is entered up, "obtained or made, is, at the time of the swearing of such affidavit, "so seised and possessed, or has such disposing power as aforesaid, "of or over such lands, &c.; and such affidavit shall specify the "county and barony, or the town and county of a city and parish, "or the town and parish in which the lands to which such affidavit "relates are situate," &c.

The first question is, what is the true construction of the part of this section which requires an affidavit to be filed by the party obtaining the order, stating the name, place of abode, and title, trade or profession of the party against whom the order was made, and whose property is sought to be affected thereby? We are of opinion that the intention of the Legislature was, that the party making the affidavit should pledge his oath to the truth of these statements, and that such is the true construction of the statute.

If there could be any doubt as to the meaning of the first part of the clause to which I have referred, such doubt would be removed by the latter part, which enables the deponent to state that, *to the best of his knowledge and belief*, the party, against whom he is registering the order, is seised or possessed of, or has a disposing power over, the estates; thereby making a distinction between this averment and the previous part relating to the residence, occupation, &c., of the defendant, which must be stated positively; but on the other hand, with respect to the estate and property of the party to be affected, it is sufficient to make the statement according to the best of the knowledge and belief of the deponent. Such being, in our opinion, the true

construction of this clause of the Act of Parliament, the next question is, whether the affidavit in this case contains the required statements?

The affidavit is in these words—[His Lordship read the affidavit.]—The only statement in the affidavit with respect to the description, residence and profession of James Sadleir is, that the "order has "been duly registered, in the office for registering judgments in "Ireland, against the said James Sadleir, by the name and descrip-"tion of James Sadleir of Clonacody, Clonmel, in the county of "Tipperary, Esq., M.P." But it is not stated that the contents of such registry were correct, or, that such *was* the residence, or occupation, &c., of the party against whom the order was obtained.

It has been argued that the sole object of the Act of Parliament in requiring the affidavit to be filed was to give information to the public, as to the person against whom the judgment or order is registered as a charge. That may be true; but if an Act of Parliament require that a particular thing shall be done, in a particular way, for a particular object and purpose, it is not for a Court of Law to inquire whether the same object might not be attained in another way.

The case of *Hatton* v. *English* (*a*) is in principle an authority upon the present case. That case has been followed by all the Courts in England. We lately had occasion to consider it in this Court, and felt that it was properly decided. That was an interpleader issue, the question being whether the goods in dispute were the property of the party against whom an execution had been issued, or, of a party claiming under a bill of sale, pursuant to 17 & 18 *Vic.* c. 36, s. 1? That bill of sale had been made between "Joseph Hare, of No. 11 Clarges-street, Piccadilly, in the county of Middlesex, lodging-house keeper, of the one part," and the plaintiff, of the other part. The bill of sale, or a copy of it, was filed in the office of the officer of the Queen's Bench, and thus every one interested in the matter had a full opportunity of obtaining all the information which the Act entitled him to; but the affidavit which accompanied it contained no description of the occupation of the

(*a*) 7 El. & Bl. 49.

E. T. 1858.
*Common Pleas.*
M'DOWELL
*v.*
WHEATLY.

debtor. Lord Campbell, at the trial, thought that the objection was fatal, but reserved the point, on account of its general importance. The case having been argued, the Court refused a rule *nisi;* Coleridge, J., in his judgment, saying, "I think that there "should be no rule; the words of the Act are too strong to bear "any doubt." The Court accordingly held in that case, that what had been done, though calculated to afford the requisite information, was no compliance with the Act. *Re Monsell* (*a*) was a decision to the same effect, upon the construction of the Registry Acts in this country, with respect to the omission, in the memorial, of the day of the date of the deed.

In that case the memorial referred to the deed as of the — day of August 1815. Upon the production of the deed, it appeared that the blanks had been filled up, previous to the registration; and although the exact date was a circumstance immaterial in itself, yet as the Legislature required that the memorial should contain the day of the date, it was held to be void. On the whole, therefore, we are of opinion that the Act in question requires that the affidavit should state, under the sanction of an oath, the residence and occupation of the party against whom the decree or order was obtained; and the affidavit in the present case does not contain any such statement.

We must therefore hold that the plaintiff has no title to this property, and that judgment must be given for the defendants.

Judgment for defendants.

## EARL OF ALDBOROUGH and another *v.* BLAND and others.

*June* 2, 3, 4, 5, 6.

The array of a special jury panel was challenged because the jury were returned and summoned without any precept issued by the Judges of Assize, or under the hand of any Judge of any of the Superior Courts at Dublin; and secondly, because the jury were not returned or summoned by the Sheriff of said county. The plaintiff, by his counterplea, alleged the making of a Judge's order for the attendance of one of the Coroners before the Master of the Queen's Bench, to enable the Master to ballot for a special jury, in accordance with the former practice existing before the passing of the 16 & 17 *Vic.*, c. 113. The counterplea averred the ballotting for and reduction of the list of names so drawn; that, by a certain writ issued out of said Court, and under their seal, directed to said Coroners, they were commanded "to have before the Justices of the Queen's Courts, on the day named, or before one of the Justices appointed to hold the Assizes in and for K., if they should come before, &c., the said jurors, &c., and that they were summoned accordingly." The defendants replied to the counterplea that the order has been made *in invitos*, notwithstanding their protest. The plaintiff having demurred to this replication, the challenge was overruled, and an exception was accordingly taken.—*Held*, that by reason of the order to strike a special jury according to the former practice, the provisions of the Common Law Procedure Amendment Act, 1853, sec. 109, relative to the issuing of a precept, did not apply to the case of a jury so summoned.

*Held also*, that there is nothing in the 3 & 4 *W.* 4, c. 91, or in the Common Law Procedure Amendment Act, to deprive the Coroner of his Common Law function of acting, in place of the Sheriff, in the summoning of juries, whether common or special, where the Sheriff is under disability.

*Held also*, with reference to an objection that it did not appear that the writ of *habeas corpora juratorum* was preceded by a writ of *venire facias*, that even assuming the omission to be material, it was only ground of error, but not of challenge.

In the course of the trial, the plaintiff read in evidence the following documents; first, an attested copy of an affidavit sworn by one of the defendants, in a petition matter, in the Incumbered Estates Court; and secondly, an office copy of objections, verified by a solicitor on behalf of the defendants. The evidence was objected to, upon the ground that the plaintiff had not proved the petition in said matter, so as to give the Court jurisdiction; and also, that the objections had not been signed.

*Held*, that these documents were admissible, as admissions, without proving the proceedings in the matter.

*Held also*, that the agency of the solicitor, who verified the objections, not being disputed, the defendants were bound by his acts in relation thereto.

*Quære.*—Whether the overruling of a challenge to the array can be made the subject-matter of an exception?

T. T. 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.

and because the said jury was not returned or summoned by the Sheriff of said county; and because the said jury was not duly returned or summoned, in pursuance and according to the statute, &c., for the trial of said case. The plaintiffs replied, by way of counterplea, that by an order dated the 10th day of February 1857, made by Mr. Justice Crampton, one of the Justices of the Court of Queen's Bench in Ireland, then presiding as Judge in Chamber for the three Law Courts, pursuant to the provisions of the statute in that behalf, it was ordered that one of the Coroners of the county of Kildare should attend before the Master of the Court of Common Pleas, with the books containing the names and additions of the special jurors of said county, and with separate cards containing the numbers to refer to said books, to enable the said Master to proced to ballot for a special jury to try the issue between the plaintiffs and the defendants, who had taken defence, in accordance to the practice which existed previous to the Act of the 16 & 17 *Vic.*, c. 113. That afterwards, R. S. Hayes, one of the said Coroners of and for the said county of Kildare, having obtained from Edward Howe, then being the Sub-sheriff of said county of K., the said books containing the names and additions of the special jurors of said county, attended with said books and with separate cards, containing the numbers to refer to said book, on the 17th day of February 1857, at the hour of one o'clock, before the Master of the said Court, pursuant to a summons issued two clear days by such Master, and which summons was duly served on the attorneys on record for the defendants, two clear days previously; and then and there, forty-eight jurors from said book having been drawn, pursuant to the statute, in presence of the attorneys for both plaintiffs and defendants respectively, the said Master appointed the 19th of February, then next ensuing, for the reduction of the number of names so drawn as aforesaid, in the presence of the respective attorneys for plaintiffs and defendants; and that in pursuance of such appointment, on the said 19th day of February, said plaintiffs' attorney attended, and struck off twelve names of said forty-eight jurors' names so drawn as aforesaid; and no person attending on

behalf of the said defendants, the Master, in pursuance of the provisions of the statute, &c., struck off twelve names indifferently from the said list, and thus reduced the said list to the number of twenty-four jurors, to try the issues pending in said cause. That by a certain writ issued out of said Court, and under the seal thereof, dated the 26th day of February 1857, and directed to the said two Coroners of the county of Kildare, or either of them, they or either of them were commanded to have, before the Justices of the Queen's Courts, on the 15th day of April 1857, or before one of the Justices appointed by the form of the statute, and soforth, to hold the Assizes in and for the county of Kildare, if they should come before, on Thursday the 19th day of March 1857, at Naas in said county, the said twenty-four jurors, so struck as aforesaid, and so summoned as special jurors in said Court before said Justices, to make a jury between the plaintiffs and defendants in said cause. That in pursuance of said writ, duly delivered to R. S. Hayes, then and there being one of said Coroners for said county, and also in obedience to and pursuant to the order so made by Mr. Justice Crampton, as aforesaid, the said R. S. Hayes, on the 10th of March 1857, being six clear days before the said 19th day of March 1857, being the Commission day of Assize in and for said county of Kildare, did duly summon said twenty-four special jurors to attend at Naas on the 19th day of March 1857, before the Justices of Assize for the said county of Kildare. That afterwards, a sufficient number of such special jurors attended, in pursuance of the said summons; and on the said cause being called on, and said jurors being called in open Court, in the order in which their names stood on such reduced list, twelve of same answered to their names, and took their places in the jury-box, as the said jurors to try said cause, &c., &c. To this counterplea the defendants replied, that the order of Mr. Justice Crampton was made on the application of the plaintiffs, and was opposed by Counsel for the defendants, who insisted before the said Judge that the order ought not to be made, and could not lawfully be made; that said order was made notwithstanding the opposition of the said defendants, who,

T. T. 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.

by their attorneys, on the occasion of the said attendance, on the 17th day of February 1857, before the Master of said Court, protested against the said order as illegal, and objected to the said Master proceeding to ballot for or strike the said jury; but notwithstanding such objection and protest, the plaintiffs, by their attorney, required the Master to proceed to a ballot for said jury, and to strike same, which he then proceeded to do, notwithstanding, &c.; and the defendants declined to attend, and did not attend, on the occasion of the said appointment, to reduce the list of the said jurors from forty-eight to twenty-four, &c.

To this replication the plaintiffs demurred, and the Lord Chief Justice having allowed the demurrer, to that ruling the defendants excepted. The trial then proceeded; and the plaintiffs produced, proved and read in evidence a conveyance, dated the 13th day of January 1855, under the seal of the Incumbered Estates Court, and signed by two Commissioners, purporting to convey to the Earl of Aldborough, his heirs and assigns, for ever, the lands in the pleadings mentioned, subject to the tenancy described in the schedule, viz:

| Denominations. | Tenants' Names. | Contents Statute Measure per Survey. | Tenants' Yearly Rents. | Gale Days. | Tenure by which Tenants hold. |
|---|---|---|---|---|---|
| | | A. R. P. | | | |
| Belan, the Demesne, Lands, and House quarter. | Reps. of the late Wm. Lewis, Esq. | 304 0 11 | £100 | 25th Mar. 29th Sept. | Tenancy from year to year; determinable on 25th March in each year. |

Among the other evidence given on the part of the plaintiffs, two documents were read, purporting to be office copies of documents dated respectively October 10th, 1850; one of them being objections on the part of Valentine Lord Cloncurry, since deceased, and of Loftus H. Bland, one of the defendants, to the sale of the said lands of Belan and house-quarter, or to the sale thereof discharged from a certain deed of fee-farm grant, lodged in the matter of the estate of the Earl of Aldborough, owner, Henry N. Trye and others, petitioners; and the other being like objections, filed in said matter by J. Harvey Lewis, another defendant. The objections were not signed; but it appeared, from these documents, that the affidavits

to verify were sworn by Edward Howe, solicitor for the parties so objecting. The plaintiffs also gave in evidence a third document, purporting to be an affidavit made by the defendant Lewis in said matter and Court. On the part of the defendants, these documents were objected to, upon the ground that the plaintiff had not proved the petition in said matter in the Incumbered Estates Court, or any petition, to give the Court jurisdiction; and also as regarded the two "objections," that they had not been signed by L. H. Bland and Lord Cloncurry and J. H. Lewis respectively. The Lord Chief Justice admitted the documents; to which ruling the defendants excepted. The case made on the part of the defendants rested chiefly upon a deed dated the 4th of April 1840, made between Mason Gerard Earl of Aldborough, since deceased, of the one part, and William Lewis, since deceased, of the other part; whereby the Earl conveyed to W. Lewis, his heirs and assigns, the said lands and hereditaments, in the pleadings mentioned, in fee-farm; and they proved the death of said W. Lewis, and the payment of rent by the defendants to the present Earl of Aldborough, one of the plaintiffs, of the fee-farm rent. The plaintiffs then went into a rebutting case, but the exceptions did not relate thereto. The evidence at both sides having closed, the Lord Chief Justice charged the jury that the Commissioners of the Incumbered Estates Court, in the absence of any proof to the contrary, were to be presumed to have acted legally and within their jurisdiction, and that the conveyance of the 18th of January 1855, to the plaintiff, the Earl of Aldborough, operated to convey to him and his heirs the lands thereby purported to be conveyed, freed and discharged from all estates and tenancies save those enumerated in the schedule thereto; and as regarding the person representing the interests of William Lewis deceased, under the deed of the 4th of April 1840, subject only to a tenancy from year to year, in the manner described in the schedule to said conveyance of the 13th of January 1850. Counsel for the defendants called upon his Lordship, on the contrary, to tell the jury that W. Lewis having been seised in fee under the indenture of the 4th April 1840, the subsequent conveyance from the Commissioners to Lord Aldborough did not convey the lands to

T. T. 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.

him discharged of the estate of the said W. Lewis, his heirs and assigns, under the former deed, he or they not having been a party or parties, as petitioner, owner or incumbrancer in said Court. The Chief Justice having adhered to his original charge, the defendants excepted thereupon. The jury found for the plaintiffs, for possession of the lands, and £127 damages for mesne rates.

*J. M'Mahon* (with whom was *H. Smythe*), in support of the exceptions.

*E. P. Levinge* and *J. T. Ball*, contra, in support of the verdict.

*H. Smythe* replied.

The following authorities were cited: viz., upon the exception relating to the overruling of the demurrer to the challenge to the array: *Rex* v. *Johnson* (*a*); 1 *Tryals per Pais*, p. 101; *Bac. Ab., Juries*, J; *Com. Dig.*, tit. *Challenge*, B; *Regina* v. *O'Neill* (*b*); 3 *Bl. Com.*, p. 359; *Wood* v. *Peyton* (*c*); *Pennell* v. *Meyer* (*d*); *Beardmore* v. *Rattenbury* (*e*); *Anon.* (*f*); 3 & 4 *Vic.*, c. 91, ss. 11 *et seq.*; 16 & 17 *Vic.*, c. 113, ss. 109 *et seq.*; 1 *Chitty's Arch. Prac.*, p. 842.

Secondly; with respect to the exception relating to the admission of the evidence: *Snow* v. *Phillips* (*g*); *Weary* v. *Alderson* (*h*); *Highfield* v. *Peake* (*i*); *Garvin* v. *Carroll* (*k*); 2 *Taylor on Evidence*, p. 1214.

Lastly; with respect to the exception relating to the validity of the conveyance by the Commissioners of the Incumbered Estates Court: *Errington* v. *Rorke* (*l*).

*Cur. ad. vult.*

(*a*) 2 Str. 1000.
(*b*) 4 Ir. Com. Law Rep. 22.
(*c*) 13 M. & W. 371.
(*d*) 8 C. & P. 470.
(*e*) 5 B. & Ald. 452.
(*f*) Godb. 194.
(*g*) Sid. 220.
(*h*) 2 M. & R. 127.
(*i*) 2 M. & M. 109.
(*k*) 10 Ir. Law Rep. 323.
(*l*) 5 Ir. Com. Law Rep. 542.

T. T. 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.
*June 6.*

MONAHAN, C. J.

This case comes before the Court on a bill of exceptions. It appeared that at the trial the defendants challenged the array. The challenge stated—[His Lordship here stated the substance of the challenge, counterplea and demurrer, see *ante*, p. 571].—The Lord Chief Justice overruled the demurrer, and the trial then proceeded. The defendants accordingly excepted to his Lordship's ruling, which forms the subject-matter of the first exception. I confess that I entertain some doubt whether a ruling upon a challenge to the array is the proper subject of a bill of exceptions; but I need not go into that question, for we are of opinion that the Lord Chief Justice was right, upon grounds which I shall presently state. The ground of the challenge was, that the jury were summoned by the Coroner, without the authority and without the precept of the Justices of Assize; and it is contended that, in order to have the jury properly summoned, there should have been a precept issued for that purpose. The Common Law Procedure Act (1853) first gave a precept for the summoning of a jury in civil cases. The course, in criminal cases, always was, for the jury to be summoned by virtue of a precept under the hands of the Justices of gaol delivery; but this Act of 1853, for the first time, enacted, by section 109, "That no jury process shall be necessary or used in any action; "but the precept issued by the Judges of Assize to the Sheriff "to summon jurors shall direct that the jurors shall be summoned "for the trial of all issues, whether civil or criminal, which may "come for trial at the Assizes, and the jurors shall thereupon be "summoned in like manner as at present." Now it has been urged by Counsel for the plaintiffs, against this challenge, that this general enactment against jury process should be limited to cases where other process has been provided by this Act. According to our view, the new law of jury process is this, that, instead of having a separate jury panel to try each case, a precept is to issue under the hands of the Judges of Assize, to summon a sufficient number of jurors, civil and criminal. If the Act stopped there, that would be the only mode, and would take away special juries under the old system altogether; but then comes the 112th section, by which the

T. T. 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.

Court or a Judge, "in such case as they or he may think fit, may "order that a special jury be struck according to the present "practice, and such order shall be a sufficient warrant for striking "such special jury and making a panel thereof for the trial of the "particular cause." That shows that, notwithstanding the previous section, the Court has authority to order such a special jury to be struck, and they must then be summoned. The Act does not say that the Judge *must* issue a precept for summoning such a jury. It has been held, since the passing of the Procedure Act, that when a special jury in the ordinary way is required, you should not proceed to summon them by a precept, but that the ordinary writs of *venire facias* and *distringas* or *habeas corpora juratorum* should go, as before. That is the recognised practice in all the Courts. That being so, had this been a special jury in the ordinary mode, which it was the duty of the Sheriff to return, no objection would lie for want of a precept. But then it is said that, because the writ was directed to the Coroner, the whole proceeding is wrong. It is clear that the Jurors Act (3 & 4 *W.* 4, c. 91) provides for the return by the Coroner of a common jury, and it likewise contains a provision (section 23) that the Court may, on motion, in every case, whether civil or criminal, order a special jury to be struck before the proper officer of each respective Court, for the trial of any issue. Then the old Common Law applies, that in every case where the Sheriff is a party, he is not to be the officer to return the jury; and as it cannot be said that the Act prevents special juries where the Sheriff is a party, it follows that in such a case the jury must be returned by the Coroner. So in analogy thereto, we can see no objection which can arise under the present statute, in the way of the Coroner summoning a special jury. It is then said, that because there is nothing upon this record to show that a writ of *venire facias* issued, as well as one of *habeas corpora*, therefore the challenge ought to be allowed; but this objection is not on the record at all. All that appears is, that the jury were summoned by the Coroner, without a precept. It appears that a writ went to the Coroner to do a certain thing, which he has done. The duty of the Coroner was to obey the writ. The omission

complained of does not appear to us to be matter of challenge, but to be ground of error, assuming it to be open to objection; but here the Coroner obeyed the writ, whatever it was, and there is nothing in fact to show that a *venire facias* was *not* issued, or that it was wanting at all. If that be so, we do not think that the point is raised on the record at all, and even if it were so, that the objection could not be raised by way of challenge.

Then comes the exception relative to the reception of illegal evidence; namely, first, of an affidavit sworn by one of the defendants; secondly, an office copy of an objection, verified by Mr. Howe on the part of Mr. Lewis, one of the defendants, and a similar one on the part of Lord Cloncurry and Mr. Bland, other defendants, and likewise verified by Mr. Howe as their attorney. The objection to the reception of the affidavit is that the petition in the Incumbered Estates Court was not put in evidence for the purpose of showing the proceedings in which the affidavit was sworn. This objection was scarcely pressed. When an affidavit is sought to be made use of as amounting to an admission against a particular party, it is not receivable in evidence, as a proceeding in the cause, but merely as a statement made on a particular occasion, which may be used against him in the same way as a verbal statement; *a fortiori*, as being a written statement; *a multo fortiori*, as being a sworn statement. This bears no analogy to the case of an answer in Chancery, for that being in reply to the interrogatories in the bill, whenever the answer is given in evidence, the questions to which it is an answer must likewise be given. With regard to the "objections," the only exception taken to the admissibility of these was, that they were not signed by the parties against whom they were read, nor was any proof given of the petition. To this the same principle applies, namely, that where a document is given in evidence as the admission of a party made by his representative or agent, it is not necessary to prove the petition, nor need the document be signed by the party himself, seeing that it is signed by his agent. Here no objection has been taken upon the ground that this individual was not the agent of the defendants, or that he acted without authority, or that the documents were not used in

T. T 1857.
*Common Pleas.*
ALDBORO'
*v.*
BLAND.

the Court. If it had been intended to rely on any of these matters, exceptions should have been pointedly taken, and, if well founded, would have been received. This exception must therefore be overruled, as it is not for us to speculate upon the impossibility of such objections as I have referred to being satisfactorily answered, if duly pointed out. The only remaining exception was the one grounded upon the fact that it appeared that Mr. Lewis, father of one of the present defendants, had made a lease to his son the defendant, of part of the lands in question; and that, inasmuch as he was not a party to the proceedings in the Incumbered Estates Court, that tribunal had no jurisdiction to sell the lands discharged of the lease (which was by way of fee-farm grant), and subject only to a tenancy from year to year. We are not at liberty to hear that point now argued, as it has recently been decided by the Court of Error that the effect of the conveyance of the Incumbered Estates Court is to convey an indefeasible title. The Incumbered Estates Court were bound to investigate the title. There can be no doubt but that they considered this question, and that they inquired whether the land should or should not be sold discharged of this alleged fee-farm grant. It cannot be contended that, if a fee-farm grant really existed, they had jurisdiction to sell the lands discharged of it; but we must conclude that they have done what they had jurisdiction to do, and that the effect of the conveyance therefore is to show that the purchaser is to hold the lands, subject only to a tenancy from year to year.

Judgment for plaintiffs.

T. T. 1857.
*Common Pleas.*

## COLLINS and wife *v.* HUNGERFORD.

*June* 8.

In an action against a Justice of the Peace, it is necessary, under the provisions of 12 *Vic.*, c. 16, s. 9, that the name and place of abode of the plaintiff's attorney should appear on the back of the notice of action (when the notice of action has been served by the attorney); and it is not sufficient that they should appear in the body or at foot of it. (KEOGH, J., *dissentiente*).

THIS was an action brought against the defendant, for maliciously and without probable and reasonable cause, and under colour of acting as Justice of the Peace, breaking and entering the plaintiffs' dwelling-house, and causing them to be imprisoned, and for maliciously returning informations against them to the Quarter Sessions.

The defendant pleaded that, before and at the time of doing the acts complained of, he was, and still is, a Justice of the Peace for the county of Cork, and that all the acts complained of were done by him in that capacity, and after the passing of the 12 *Vic.*, c. 16. That a notice in writing of the action had been served upon him by the plaintiffs' attorney, but that it was not indorsed upon the back with the name and place of abode of the plaintiffs' attorney, as required by the above-mentioned statute.

To this the plaintiffs replied, admitting that the notice of action had been served by their attorney, and alleging that in such notice all the provisions and requirements of the statute were strictly followed, save and except the direction therein contained as to indorsing on the back of said notice the name and place of abode of said attorney; but that the notice set forth clearly, plainly and explicitly in the body of it, the name and place of business of their attorney, in the following words and figures:—"Henry Bacon "Julian, of No. 61 South Mall, Cork, one of the attorneys, who is "the attorney of the said Timothy Collins and Margaret his wife;" and that also, at the foot of the notice, the name and place of business of their attorney was set forth as follows:—"Henry Bacon "Julian, attorney for the said Timothy Collins and Margaret his "wife, No. 61 South Mall, Cork;" submitting that the defendant had been thereby fully and sufficiently informed of the name and place of business of their attorney, and that the provisions of the statute had been substantially and sufficiently complied with.

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

To this replication the defendant demurred, on the ground that it was not a sufficient compliance with the requirements of the statute merely to set forth the name and place of business of the attorney in the body or at the foot of the notice.

*Exham*, in support of the demurrer.

This statute (12 *Vic.*, c. 16) is intituled an Act to protect Justices of the Peace in Ireland from vexatious actions for acts done by them in the execution of their office; and section 9 enacts:— "That no such action shall be commenced against any such Justice, "until one calendar month at least after a notice in writing of such "intended action shall have been delivered to him, or left for him at "his usual place of abode, by the party intending to commence such "action, or his attorney; in which said notice the cause of action, "and the Court in which the same is intended to be brought, shall "be clearly and explicitly stated; *and upon the back thereof shall* "*be indorsed* the name and place of abode of the party so intending "to sue; and also the name and place of abode or business of the "said attorney, if such notice have been served by such attorney."

It is not sufficient that the name and place of abode should appear elsewhere than on the back of the notice.—[MONAHAN, C. J. Suppose a sheet partly written at both sides, which would be the back?] —This is not the supposed case, there being one clean side to this notice. The Magistrate was only bound to look at the back of the notice for the attorney's name.

The only decision in favour of the plaintiff is *Crook* v. *Curry*, referred to in 1 *Tidd's Practice*, p. 30; but that was only a Nisi Prius decision; and it is even doubted by the text-writer, who refers in the same note to *Lovelace* v. *Curry* (*a*), citing *Strickland* v. *Ward* and *Taylor* v. *Fenwick*. The provisions of the statute must be implicitly followed.—[BALL, J. The objections in those cases were substantial; but here, how was the defendant injured by the address of the attorney not appearing on the back of the notice?]— Such statutes must be strictly construed: *per* Lawrence, J., in *Lovelace* v. *Curry*. The statute 1 *Vic.*, c. 26, required a particular

(*a*) 7 T. R. 634.

mode of signature to a will; and several cases of great hardship occurred where wills were held invalid, the precise method of signing not having been observed by testators, and an Act of Parliament was found necessary to remedy the inconvenience: *Sug. Real Prop. Stat.*, p. 311 (1852), referring to *Smee* v. *Bryer;* 15 & 16 *Vic.*, c. 24; 1 *Jarman on Wills*, p. 90; 6 *Notes of Cases*, 12 (Appendix). This is stronger than the case of a will, as an attorney must be presumed to be better acquainted with the law than testators in general.—[KEOGH, J. Strictly speaking, may not "indorsement on the back," be taken to mean signature on the front?]—If so, the plaintiff should have joined issue on the defendant's plea.

*J. Clarke* (with him *E. Sullivan*), contra.

A literal compliance with the requirements of this statute is not required, as appears from analogous decisions upon the English statute 24 *G.* 2, c. 44: *Crook* v. *Curry* (*a*); *Rex* v. *Bigg* (*b*); *Holingworth* v. *Palmer* (*c*); *Martins* v. *Upcher* (*d*).

*Exham* was heard in reply.

*Cur. ad. vult.*

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KEOGH, J.

*June* 12.

This is an action brought against the defendant, for the false imprisonment of the plaintiff and his wife. The defendant, who is a Magistrate, has pleaded, that the acts were done by him in the discharge of his duties as Justice of the Peace, and after the passing of the statute 12 *Vic.*, c. 16; that, more than one month before the action was brought, he received a notice of the action, served upon him by H. B. Julian, the plaintiffs' attorney, but that the name and place of abode of the plaintiffs' attorney was not indorsed on the back of the notice, as required by the provisions of the above statute. To that plea the plaintiff has replied, that the notice was served by his attorney, as stated in the defence, and that all the

(*a*) *Ubi sup.*

(*b*) 3 P. Wms. 419; S. C., 1 Stra. 8.

(*c*) 4 Ex. 267.

(*d*) 3 Q. B. 662.

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

requirements of the statute have been complied with, except as regards the name and place of abode of his attorney, which, he alleges, were set out in the body and at foot of the notice plainly, clearly and explicitly; and that thereby, the name and place of abode of the attorney appearing both in the body and at foot of the notice, the defendant was fully informed of the attorney's name and place of abode, and that the requirements of the statute have so been substantially and sufficiently complied with. To this replication the defendant has demurred; and the question is, whether this is a sufficient notice to the defendant, taking into consideration the frame of the pleadings and the language of the statute? Now, as regards the frame of the pleadings, although I at first felt some hesitation upon this part of the case, I am still disposed to think that the defendant has precluded himself from alleging that there is any indorsement, by the words of his replication, which must be regarded as an admission of the fact that the name and place of abode of the plaintiffs' attorney are not indorsed upon the back of the notice, in the literal sense of the words of the statute. Then, we come to consider this statute 12 *Vic.*, c. 16, which, although a recent enactment, is taken from an old English Act, 24 *G.* 2, c. 44, to which I refer. The words of 12 *Vic.*, c. 16, s. 9., are as follows:—"No such action" (the preamble stating that the statute was for the protection of Magistrates from vexatious actions) "shall be commenced against any such Justice of "the Peace, until one calendar month at least after a notice in writing "of such intended action shall have been delivered to him, or left "for him at his usual place of abode, by the party intending to "commence such action, or by his attorney; in which said notice the "cause of action, and the Court in which the same is intended to be "brought, shall be clearly and explicitly stated; *and upon the back* "*thereof shall be indorsed the name and place of abode of the* "*party so intending to sue, and also the name and place of abode* "*or business of the said attorney, if the notice have been served by* "*such attorney.*" Now, I pause here to observe that, whether every portion of this enactment is to be considered equally mandatory or not, there is more force or stress laid upon the former part of it; for the words are—"shall be *clearly and explicitly* stated;" whereas

the language of the latter part is simply—"and upon the back shall be indorsed," &c. It is in reference to the latter part of the sentence that the demurrer is taken. This is, as I have observed already, a recent enactment; but is evidently copied from and contains the same language as the old English statute; and therefore, if there be clear and distinct enactments upon the English statute, it will be impossible to distinguish that Act from the present one, and from the legal effect of its provisions.

Now we come to consider the operation of the section; and it is contended, on behalf of the defendant, that the statute clearly and explicitly requires that the name and place of abode of the plaintiff's attorney must be "indorsed on the back" of the notice, in the literal words of the statute; that no other construction is admissible; and then Counsel points out what he considers to be the back of the notice. Now, first, I ask what is the back of the notice? It is admitted that the name and place of abode of the plaintiff's attorney are to be found in the body of the notice, and also at foot, fully, clearly and sufficiently set forth, and that the notice was quite sufficient for all the purposes of the statute, viz., to give the opposite party full information as to the name and place of abode of the plaintiff's attorney; but the argument of the defendant's Counsel is, that unless the name and place of abode of the attorney are again repeated, upon what he calls the back of the notice, it will not be sufficient. We must therefore consider what is the back of the notice. Suppose the notice to consist of a single sheet of paper, upon one half of which the writing was contained, and that the other half was turned down short, so as to double the sheet, I ask would not what was originally part of the front of the notice become, by this operation, the back? In one way it would; in another way it would not. Suppose, again, that the writing is continued to the other side of the sheet, and that the name and place of abode appear upon that side, will it be contended that it is not upon the back of the notice? That question was put during the argument to the able Counsel who appeared for the defendant, and the only reply he could give was that, in that case, such would not be the back of the notice, but that it would

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

be necessary to add another sheet, so as to form a back; so that it is very difficult to say what is, in point of fact, the back of the notice. There can be no doubt that nothing is more dangerous than to give a loose construction to Acts of Parliament, in cases where the words are clear and explicit; but I believe it to be a good rule to look to the clear policy of the Legislature, where the words, in their literal sense, would render the enactment of the Legislature absurd. In such cases, I conceive it to be by no means a bad rule of construction, to reject and pass over words which, in their literal sense, would make such enactment absurd and ridiculous. Let us see whether this rule has ever been acted upon, in order to give effect to an Act of Parliament. I refer to *Dwar. on Statutes*, p. 591, for the purpose of ascertaining whether words as clear as these have ever been departed from. The following example is given:—"A statute (5 *G.* 2, c. 20) imposed a penalty "on persons piloting ships 'down the Thames;' this was held by "the Court not to extend to vessels which, having performed their "foreign voyages, are steered from one wharf to another, for the "purpose of unloading their cargoes." The words of that statute were as clear as those in the present case; but still they were departed from, on account of the manifest absurdity that would follow their literal construction. Also, in the section the heading of which is "common sense construction," Mr. *Dwarris* refers to the statute 23 *G.* 3, c. 49, which enacts, "That no bill of exchange shall be received in evidence, unless it be first duly stamped." Now, if the literal sense of the words is to be the only one to prevail, can we imagine a clearer enactment than this? Still the words of the statute have been departed from in a matter of life and death; for, upon an indictment for forging a bill of exchange, an objection was made to the reception of the document in evidence, it not having been stamped; but all the Judges before whom the question was argued held that it need not be stamped, notwithstanding the provisions of the Act. There was, no doubt, a strong reason in that case why the document should be received in evidence; but I only use this case in reply to the argument of Counsel, that the literal meaning of words can never be departed from, no matter how

absurd it may be, or how much soever opposed to the clear intention of the Legislature. Mr. *Dwarris* calls this the "common sense construction;" and it is somewhat refreshing in a legal treatise to find that common sense may sometimes prevail. But he does not stop there; he gives another instance, in a case under 5 & 6 *W.* 4, c. 50, s. 98, which confers on the Court before which an indictment shall be "preferred" a power to certify the costs of a special jury. It appeared that, under a former Act, *in pari materiâ*, 13 *G.* 3, c. 78, s. 65, the words were, "before which any such indictment shall be tried;" and, in a case coming under 6 & 7 *W.* 4, c. 50, the Court held that the word "preferred" must be understood to mean "tried." Lord Denman says, in that case:—"If we were to decide "against it, we would determine that the Legislature had been "guilty of a very extraordinary omission; for, in a great majority "of cases, the indictment is preferred before a different Court from "that in which it is tried. I am of opinion, therefore, that we may "give to s. 98 the construction contended for." In the case of *Hall* v. *Franklin* (*a*), Lord Abinger says:—"We have been "strongly pressed with the inconveniences that may result from this "construction of the statute. We are not insensible to them; but "the only proper effect of that argument is to make the Court cau-"tious in forming its judgment. We cannot, on that account, put a "forced construction upon the Act of Parliament."

We must now consider what was the intention of the Legislature in the present case. The object clearly was, to give the opposite party a full opportunity of making amends, by informing him of the name and residence of the plaintiff's attorney. It has not been contended that the policy of this enactment has been at all departed from in the present case; so that, in addition to the difficulty of deciding what is the back of the notice, we have here the intention of the Legislature carried out, which may be fairly inferred to have been, that a separate entry of the name and place of residence of the plaintiff's attorney should appear on the notice, in order to give the opposite party sufficient opportunity of making amends. Further, it appears that this provision, as to notice of action, is not confined

(*a*) 8 M. & W. 295.

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

to Justices of the Peace alone, but it is also to be found in cases of custom-house and other officers; and it is certainly remarkable, that the words "indorsed on the back" do not appear in the enactments conversant with them; and, from this fact, it may be argued that the Legislature intended to make a distinction in the case of Justices of the Peace; but, in my opinion, such is not the case. All the statutes which apply to actions brought against other officers contain a provision that the name and place of abode of the attorney must appear on the notice, for the purpose obviously of enabling the opposite party to make amends; and, as to this provision, requiring indorsement, it is really a case of the merest technicality, and the defendant's Counsel could assign no reason for the thing contended for. But it was asserted that Justices of the Peace should be protected, and that the Legislature so intended: no doubt, they should; but cases occur in which Justices of the Peace sometimes act maliciously, and the subject should not be deprived of this cause of action through mere technicality. *Wood and others* v. *Folliott*, referred to in 3 *Bos. & Pul.* (note), is a decision upon 23 *G.* 3, c. 70, s. 30, which enacts:—"That no writ "shall be sued out against, nor a copy of any process served "upon, any officer or officers of excise, or against any person or "persons acting by his or their orders, and in his or their aid, &c., "until one calendar month next after notice in writing shall have "been delivered to him, or left at the usual place of his abode, "by the attorney or agent of the party who intends to sue out "such writ or process as aforesaid; in which notice shall be clearly "and explicitly contained the cause of action, the name and place "of abode of the person who is to bring such action, and the "name and place of abode of the said attorney or agent." The notice of action in that case described the plaintiffs as "William "Wood, of Rotherhithe in the county of Surrey, Alexander Wood, "late of the same place, mariner, and Osborn Deverson, late of "the same place, mariner;" and the attorneys' description was, "Donne & Cox, Furnival's-Inn, attorney for the said W. W., A. W. and O. D." The case was tried before Mr. Baron Hotham, who was of opinion that the notice was insufficient; but, upon argument

before the Full Court, upon a rule for a new trial, Lord Loughborough, in giving judgment as to the sufficiency of the words, "of Rotherhithe," as a description under the statute, says:—"I "think the notice is sufficient, and that it answers all the purposes "of the Act; the intent of it was that the party should have an "opportunity of tendering amends. This is an action by partners; "the description of the first is fully sufficient; a letter by the "post would have found them; so would a porter." Now the Act of Parliament in that case was just as mandatory as the statute under our consideration; for it requires that the name and place of abode of the person bringing the action should be "clearly and explicitly" stated. All that the Legislature requires to be clearly and explicitly stated, by the 12 *Vic.*, c. 16, has been so stated; for these words do not apply to the indorsement of the name and place of abode of the attorney. This was therefore a decision upon an Act of Parliament, in its terms more stringent than the Act now before us. In *Osborn* v. *Gough* (*a*), which was a case under the Magistrates Acts (24 *G.* 2, c. 44, s. 1), the description of the plaintiff's attorney was, "William Spurrier, of Birmingham in the "county of Warwick, attorney for the within-named William "Osborn;" and that was held to be a sufficient description. That decision was not exactly *ad idem* with the present case; but the language of Lord Alvanley is important, and he refers to *Wood* v. *Folliott*, with approbation. *Taylor* v. *Fenwick* was also a case under the Magistrates Acts, and the notice concluded thus, "given under my hand, at Durham." That was held to be insufficient as a description of the attorney's residence, which it clearly was; for a man might sign a document in London, though his place of residence was Dublin. That case, however, is important in this way; for the 24 *G.* 2, c. 44, s. 1, required that the attorney's name and place of abode should be "indorsed on the back of the notice," as in the present case; but still it never occurred either to the Counsel who argued that case, or to the Judges who decided it, that such a point could be raised. Why should not that point have been pressed, if it had any force? for it certainly appears, from the argu-

(*a*) 3 Bos. & Pul. 520.

ment of Counsel in that case, that the notice had no indorsement. The latter case is referred to in the argument of Counsel in *Mayhew* v. *Locke* (*a*); and, although such a reference is not matter of authority, yet, the case being cited by such an able lawyer as Lord Lyndhurst (then Serjeant Copley), may be regarded as a statement of his opinion as to the case he cites. But the authorities do not stop there. In *Tidd's Practice*, p. 30, the case of *Crook* v. *Curry* is referred to, tried before Baron Thompson, in which he held that the attorney's name and place of abode being in the body, instead of on the back of the notice, was sufficient, upon the ground that the policy of the statute (24 *G.* 2, c. 44) was, that the Justice of the Peace might be enabled to tender amends to the plaintiff or his attorney. That decision must be overruled, if the notice in the present case be held insufficient; and although it is, I admit, but a Nisi Prius decision, still it appears to indicate the opinion of the Profession then, and to have been followed for nearly a hundred years. In the present case, we have the attorney's name and place of abode within the body and at foot of the notice; in that case, it is only to be found in the centre of the notice. There is no report of that case having been overruled *in Banco*, and the statute has been in force for over a hundred years; and where the intention of the Legislature has been carried out, by affording to the Magistrate a sufficient protection, I do not think that the suitor should, by a miserable technicality, be deprived of his right of action. I think, therefore, upon all these grounds, that we should hesitate before we overrule the case of *Crook* v. *Curry*, more particularly as common sense, and the plain intention of the Legislature, are in favour of that decision.

JACKSON, J.

In this case, I entertain a different opinion from that which has been so clearly expressed by my Brother KEOGH. I conceive that we are bound in this case to decide according to the law of the land; and that we are not at liberty, either for the purpose of supplying what we may imagine to be a defect, or a mistake on the part of the

(*a*) 7 Taunt. 64.

Legislature, to repeal an Act of Parliament. The treatise that has been referred to by my Brother KEOGH *(Dwarris on Statutes)* clearly expresses the grounds of my opinion, viz., that we must consider the Legislature as acting upon general principles; and I think it is a matter of the greatest importance that we should abide by the law as we find it, and not decide in reference to any particular case; because, if uncertainty of construction be once introduced, neither the suitor nor the Counsel will be able to know what the state of the law is upon any one subject.

Let us now consider this statute, 12 *Vic.*, c. 16; it is in terms as follows—[His Lordship read s. 9.]—Now the language of that section expresses clearly and forcibly that, before bringing an action, a notice must be served on the defendant, with the name and place of abode of the attorney indorsed on the back. It is not merely that these words must be "indorsed," but "indorsed on the back;" and therefore there can be no ambiguity as to the meaning of the Legislature. This indorsement is required, without reference to what may appear in the body of the notice; and therefore we must repeal this Act of Parliament, if we hold the notice to be sufficient in the present case; for there is no indorsement on the back of this notice. I am free to confess that if this matter had not been admitted on the pleadings, it might have been a question for a jury, and that a jury might have been persuaded to find that, in point of fact, there was an indorsement, in the sense in which my Brother KEOGH has explained the matter, by holding the notice in a particular way; but that is not now the question for the Court, and we must decide simply upon the construction of this Act of Parliament. If we were at present sitting in a Committee of the House of Commons, and a proviso were proposed to be added to this Act, to the effect that the notice should be sufficient without such indorsement, I would readily concur; but we are not now called upon to legislate, but only to construe an Act of the Legislature. A class of cases were referred to by the LORD CHIEF JUSTICE, when we were discussing this matter in Chamber, which were not alluded to in the argument, namely, cases on attorneys' actions for bills of costs, under 2 *G.* 2, c. 23, s. 83, which enacts that no action shall be commenced for a bill of

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

costs "until the expiration of one month or more after such attorney "or solicitor respectively shall have delivered unto the party or "parties to be charged therewith, or left for him, her or them, &c., "a bill of such fees, &c., written in a common legible hand, and "in the English tongue (except law terms and names of writs), "and in words at length (except times and sums); which bill shall "be subscribed with the proper hand of such attorney or attorneys "respectively." Upon that statute, decisions took place in England, and attorneys were frequently defeated in their actions, on account of abbreviations which could not possibly mislead any one; but the Act having enacted that the bill should be drawn out in the English language, in words at length, the Courts felt bound to hold that such abbreviations as "Mr. and Mrs." for "Mister and Mistress" could not be admitted; and this enactment consequently pressed so hardly upon attorneys, that the Legislature passed the 12 *G.* 2, c. 13, s. 5, permitting attorneys to use the ordinary abbreviations. Notwithstanding the passing of the later Act, I find a case in which an attorney was nonsuited, for using such words as "pd.," "atty.," "lres.": *Reynolds* v. *Caswell* (*a*). The nonsuit was subsequently set aside, because of the provisions of the latter Act; but not without a protest on the part of the Judge who tried the case, for he said that such words were not in common use in the English language. I may observe that there is no such Act in force in this country. The present case appears to press very hard upon the plaintiff; but we must abide by the law as we find it. Only one decision has been referred to exactly in point; but that was only a Nisi Prius decision, which does not appear to have been ever quoted in any subsequent case (my Brother KEOGH says it has never been overruled), nor does it appear in any book of reports; it is only to be found in *Tidd's Practice*, and nowhere else. Many cases have come before Courts of Law, in which a contrary principle has been upheld: *Lovelace* v. *Curry* (*b*).—[His Lordship stated the facts of that case.]—In that case, the notice gave very full information to the defendant; but, because it did not follow the strict enactment of the statute, in

(*a*) 4 Taunt. 193. (*b*) 7 T. R. 631.

describing the nature of the action, it was held insufficient. In that case, Lord Kenyon says, "We are bound to decide according to the law as we find it;" and so say I here. That was, no doubt, an important consideration, alluded to by my Brother KEOGH, that the policy of the Legislature was to enable the defendant to tender amends; but, in all such cases, it is in the power of a Magistrate to consult with his law adviser upon the subject of the action brought; and it is quite impossible for us to say whether this is a vexatious proceeding or not. No doubt, Justices of the Peace consider all such actions vexatious, and will, in most cases, take the advice of Counsel, and lay the notice of action before them; and, in all the cases of this kind that have come under my notice, the Judges have said, "We do not blame a Justice for availing himself of technical objections." If the defendant had laid this notice before Counsel, the latter would have told him that it was insufficient, and he would not tender amends, and the Courts would uphold him in not doing so, the proceedings being contrary to law. In *Lovelace* v. *Curry*, all the authorities upon this subject appear to have been very fully considered by the Court; and the proposition that Lawrence, J., arrives at is, "whether or not the terms of the Act of Parliament have been complied with?" and he cites the decision in *Taylor* v. *Fenwick*, as follows:—"*Sed*, "*per Curiam*—The statute has prescribed a form that must be "implicitly followed, and admits of no equivalent. The statute "was made to introduce a strictness of form in favour of Justices, "and it must be observed literally." There is also an important note attached to the report of the latter case, taken from the note-book of Mr. Justice Yeates, relative to the case of *Strickland* v. *Ward*, where the notice was held deficient, as incorrectly describing the nature of the action. Several cases have been cited by my Brother KEOGH, but they do not bear precisely upon the present point. In *Ward and others* v. *Folliott*, the residence of one of the plaintiffs alone was given, and the Court held that sufficient, inasmuch as they were partners, and tender of amends to one would be sufficient for all. *Taylor* v. *Fenwick* was altogether a different case from this; and it was relied upon as having been cited by Lord

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

Lyndhurst, in *Mayhew* v. *Lock*, when he argued the latter case; but I do not think that the argument of Counsel in any case can be regarded in any other light than as the most advantageous manner in which he can represent his client's case to the Court. These are the cases that have been referred to, in addition to those referred to in *Dwarris;* but I do not think that any of them can affect the rule which must bind us in the present instance. Therefore, it being admitted that there was no indorsement upon this notice, I am of opinion that we should allow the demurrer.

BALL, J.

The point which we are called upon to decide in the present case is this:—whether, when a statute directs that no action is to be brought against a Justice of the Peace, until after a month's notice of action has been delivered, with the name and place of abode of the plaintiff's attorney indorsed upon the back of the notice, the Court may dispense with such indorsement, provided that something else has been done, which the statute did not direct, but which the Court may suppose to be just as good as what the statute has ordered? In other words, that when the statute requires the name and abode of the attorney to be indorsed upon the back of the notice, the plaintiff is to be at liberty to disregard the requirements of the Act, and substitute what he may imagine will answer the purpose as well; that is, the insertion of such name and place of abode in the body of the notice, and at the foot of it. But how have the Courts in England dealt with this subject? Lord Mansfield, in *Taylor* v. *Fenwick* (cited by Lawrence, J., in *Lovelace* v. *Curry*, 7 T. R., p. 645), says:—"The statute has prescribed a form "which must be implicitly followed, and it admits of no equivalent. "The statute was made to introduce a strictness of form in favour of "Justices, and it must be observed literally:" and Lord Kenyon, in *Lovelace* v. *Curry*, says to the same effect, "We are bound to "decide according to the law as we find it, without considering "whether or not the Legislature did right in requiring the notice to "be given, which is required by the Act of Parliament:" and again, his Lordship adds, "In *Strickland* v. *Ward*, it was ruled by Yeates, J.,

"that a notice under the Act of Parliament ought to be precise, "and, that the Magistrate did right in not tendering amends, "because the notice was not conformable to the statute." Such being the principles of law applicable to notices of actions against Magistrates, what is urged by the plaintiff here, to sustain the validity of this notice? Cases have been cited at the Bar, wherein it has been held that, where an indorsement purporting to be such as is required by the statute, and, as conformable thereto, has been written on the back of the notice, the Courts have held it a sufficient compliance with the directions of the Act, although more precise and certain terms might have been used for the purpose. Thus, in *Osborne* v. *Gough* it was held, that the words "of Birmingham," indorsed upon the notice, were a sufficient description of the place of abode of the plaintiff's attorney, to satisfy the requirements of the statute,—there being no precise language wherein it was necessary to describe the abode of the attorney, and the only question being whether the terms used in the indorsement were a sufficient description of his abode. In like manner, in the case of *Wood* v. *Folliott*, the action was brought by three persons, partners in trade, and the statute required the name and place of abode of the plaintiff to be specified in the notice of action; and it was held, that a notice describing one of the three partners as of the place where the business was carried on, and the two other partners as "late" of the same place, was sufficient, inasmuch as a tender of amends to one of the three partners would be sufficient for all; and the specification of the abode of the one plaintiff, who was described in the notice as of the place where the business was carried on, was a compliance with the directions of the statute. It may be observed, also, with reference to this case, that the action was brought, not against a Magistrate, but against Revenue officers, and under a different Act of Parliament, and a different form of notice. Other cases have been relied on, to the same effect, but no authority (unless *Crook* v. *Curry*, to which I shall presently refer, may be so deemed) has been cited for the position that the plaintiff, in an action against a Magistrate, is at liberty to substitute for the indorsement of the notice of action required by the

T. T. 1857.
*Common Pleas.*
COLLINS
*v.*
HUNGERFORD.

statute the insertion of the name and abode of his attorney in any other part of the notice.

As to the case of *Crook* v. *Curry*, cited from a note in *Tidd's Prac.*, it may be sufficient to observe, that it is a case not to be found in any of the regular reports; that it appears never to have been cited in any subsequent case, and, for that reason, could not have been overruled, and is never referred to in any other text-book but *Tidd;* and when referred to by him, it is followed by a *quære* indicative of its want of authority to sustain it; and finally, that it is a decision at variance with the well established principles of law laid down in the cases to which I have adverted in the commencement.

It has been much pressed that there may be occasionally great difficulty in carrying out literally the provisions of the Act, as to indorsement upon the back of the notice, for it may not be always easy to define what the back of the notice is. Suppose, for instance, the notice to have been contained upon one sheet of paper, written on both sides, *which* is, it is asked, or is either of them, the back of the notice? To this it has been replied, that however that may be, no such difficulty occurs in this case, and we have not that difficulty (if it be one) to encounter. But, besides, may it not be urged that the plaintiff's replication, which in terms avers that while the name and place of abode appeared in the body and at foot of the notice, it was not indorsed on the back thereof, precludes all question on this head as to the existence of the back of the notice in this case, whereon the indorsements might have been made.

MONAHAN, C. J.

During the argument of this case, and since, I have entertained considerable doubt as to how this case should be decided; and I confess that I had not quite made up my mind upon the subject when I came into Court to-day; but upon the best consideration that I have been able to give the case, I think we are bound to adopt a construction in accordance with the words and plain meaning of the statute, and that we are not at liberty to enter into any consideration as to whether the Legislature were right or wrong

in requiring such particulars. I may observe that the Legislature have not altogether adopted the provisions of the former statute; a portion has been omitted from the present statute, which only requires that no action is to be brought for one calendar month, and that a month's notice should be given, not of the nature of the action merely, but of the cause of action, and of the Court in which it is brought, and then follow these words:—"And upon the "back thereof shall be indorsed the name and place of abode of "the party so intending to sue, and also the name and place of "abode or of business of the said attorney, if such notice has been "served by such attorney."

I have no doubt that the word "back" was introduced because the word "indorsed," if alone, might give rise to future dispute. It has been decided that a bill of exchange may be indorsed upon the front; and that may have been the reason why the Legislature made use of both these words in the present instance. If I were to try the present case, I would probably take the opinion of a jury as to whether this was the back or front of the notice upon which the words were written; but it is admitted upon the pleadings not to be on the back of the notice; for the plaintiff says that he has complied with the requirements of the statute, although the attorney's name and abode are not upon the back of the notice. Under these circumstances, without going into the authorities, I think I must construe the statute as I find it, and hold that it was necessary that these words should have appeared on the back of the notice. I regret that the plaintiff did not follow the words of the statute, if he had a good cause of action. I would not regret that this Act of Parliament should be amended; but I conceive that I should be usurping the province of a legislator, and not fulfilling the office of a Judge, if I were to hold that the notice in this case was sufficient.

Demurrer allowed.

M. T. 1857.
*Common Pleas.*

## M'DOWELL *v.* DOYLE.

*Nov.* 10, 25.

A promissory note was made payable to J. S., who, at the time, was public officer of the T. Bank. The summons and plaint averred that the plaintiff had been duly appointed, and now was official manager of the said Company, and, as such, entitled to sue upon and recover the amount due upon the note. The defendant, in his defence, set out the note *in hæc verba*, and alleged that J. S. never indorsed said note; that the plaintiff had no authority from J. S. to indorse the same; and that the right of action upon said note was in J. S.—*Held*, upon demurrer, that, inasmuch as under the 6 *G.* 4, c. 42, the sole function of the public officer was to represent his Company, as the nominal plaintiff or defendant, in suits brought by or against it, the note in question must be deemed to have been made to J. S. in his individual capacity; and that the right of action was not, in the absence of any indorsement by J. S., transferred to the official manager, under the 11 & 12 *Vic.*, c. 45.

*Held also*, that the special count was incapable of being supported as a count [illegible]deration for which the note was passed.

This was an action by the plaintiff, as official manager of the Tipperary Joint-stock Bank, against the defendant, as maker of a promissory note. The summons and plaint alleged that the defendant, on the 7th of January 1856, by his promissory note, now overdue, promised to pay one James Sadleir, then and there being the public officer of the Tipperary Joint-stock Bank, at the Tipperary Joint-stock Bank, at Roscrea, £8 sterling, three months after the date thereof, for value received; that the said promise was so made by the said defendant to the said James Sadleir, as such public officer of said copartnership, and which said note was duly presented at the Tipperary Joint-stock Bank in Roscrea, but same was not paid; that said plaintiff has been duly appointed, and now is, official manager of the said copartnership, and, as such, entitled to sue upon and recover the said amount now due on the said note. There was a second count, alleging a promise by the defendant to pay the said copartnership at the Bank in Roscrea; also the usual money counts. The defence pleaded to the first count alleged that the promissory note in first paragraph mentioned was in the words and figures following:—"Roscrea, 7th January 1856.—Three months after "date, we jointly and severally promise to pay James Sadleir, Esq., "or order, at the Tipperary Bank, Roscrea, £8 sterling, value re-"ceived. "Signed, Jerry Doyle,

"Michael Bowen."

The defence then averred that the said James Sadleir never indorsed the said note; that the indorsement on the said note was

as follows:—"Pay the Governor and Company of the Bank of "Ireland, or order, for James Sadleir.—George M Dowell, official "manager." That the said George M'Dowell had no authority from the said James Sadleir to indorse said note, and that the right is vested in said James Sadleir to indorse said note, and that the right of action upon said note is vested in the said James Sadleir, and not in the plaintiff. The defendant traversed the allegations in the other counts. The plaintiff demurred to the special plea, upon the ground that the right of action on the said note, upon the facts stated in the first paragraph, not traversed by the plea, was vested in the plaintiff, as official manager of the Tipperary Joint-stock Bank.

*Kernan* (with whom was *D. Lynch*), in support of the demurrer, contended that the right to sue upon the note was, prior to the suspension of the Tipperary Joint-stock Bank, vested in James Sadleir, as public officer of the Company, under the 6 *G.* 4, c. 42; and that, in consequence of the suspension of the Bank and the winding-up order, the right of action was, by the operation of 11 & 12 *Vic.*, c. 45, ss. 29 & 50, transferred to the plaintiff as the official manager of the Company. The original contract was made with the Bank through the medium of their officer. The cases where principals have availed themselves of the benefit of contracts made with their agents are analogous to the present: *Garrett* v. *Handley* (*a*); *Stones* v. *Butt* (*b*); *Bateman* v. *Phillips* (*c*).

*D. C. Heron*, contra, argued, that the legal effect of the instrument was, to confer a title to sue thereon upon James Sadleir, in his individual capacity alone, and that such right could only be transferred by indorsement; that the 6 *G.* 4, c. 42, s. 10, created a public officer, merely for the purpose of suing or being sued on behalf of the Company, as the nominal plaintiff or defendant, without vesting in him personally a right of action; and that although the note in question might have been made payable to Sadleir, as the trustee of

(*a*) 4 B. & C. 664. (*b*) 2 Cro. & Mees. 416.
(*c*) 15 East, 272.

M. T. 1857.
*Common Pleas.*
M'DOWELL
*v.*
DOYLE.

the Company, there was nothing in the Act of Parliament to enable him to take it in his capacity of public officer; and consequently, that the present plaintiff, by his appointment as official manager, acquired no legal right of action: *Evans* v. *Cramlington* (*a*); *Chitty on Contracts*, 4th ed., p. 96; *Stephen's Com. Law Practice, by Lush*, ed. 1856, p. 64; *Robertson* v. *Sheward* (*b*); *Soares* v. *Glynn* (*c*); *Addison on Contracts*, last ed., p. 959; *Higgins* v. *Senior* (*d*); *Feltmakers Company* v. *Davis* (*e*); *Leadbitter* v. *Farrell* (*f*); *Todd* v. *Wright* (*g*); *Pease* v. *Hirst* (*h*); *Webb* v. *Spicer* (*i*); *Storey on Bills*, pp. 73, 254.

*Lynch*, in reply, contended that, at all events, the first count was capable of being supported as a count upon the consideration for which the note was passed.

*Cur. ad. vult.*

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MONAHAN, C. J.

*Nov.* 25.

This was an action brought by Mr. M'Dowell, the official manager of the Tipperary Joint-stock Bank, against the defendant, who was the maker of a promissory note. The plaintiff complains.—[His Lordship here stated the substance of the first paragraph of the summons and plaint.]—There are other counts upon which issue has been taken. The demurrer only applies to the plea filed in answer to the first count upon the promissory note. That defence is this.—[His Lordship stated it.]—The question raised by the demurrer filed to that plea is this, whether the defendant Doyle is indebted to the Tipperary Joint-stock Bank, on foot of this promissory note? It was a note made payable to James Sadleir, and it was passed for the amount of a debt due to the Bank, not for any debt due to James Sadleir. It is admitted by the demurrer that the Tipperary Bank had suspended payment, and that the plaintiff was

(*a*) Skin. 264; S. C., 2 Vent. 307.
(*b*) 1 M. & Gr. 511.
(*c*) 8 Q. B. 24.
(*d*) 8 M. & W. 834.
(*e*) 1 B. & Pull. 101.
(*f*) 5 M. & S. 344.
(*g*) 16 Law Jour., N. S., Q. B., 211.
(*h*) 10 B. & C. 123.
(*i*) 13 Q. B. 886; S. C., in Error, 3 H. L. Cas. 510.

duly appointed official manager to call in the assets. The principal question argued before us was, whether a right to sue on this note, as a promissory note, is now vested in Mr. M'Dowell, as the official manager, and is no longer in J. Sadleir, and whether Mr. M'Dowell is therefore entitled to sue on the note? The argument of Mr. *Kernan* was this; that where a contract has been made with an agent, not for the benefit of the agent, but for that of the principal, though the agent may sue on the contract for the benefit of the principal, yet the principal may interpose and maintain a suit for his own benefit. Several cases have been cited with reference to contracts made with agents, enuring to the benefit of their principals; and also with respect to a firm having a right to sue upon a guarantee given to an individual member on behalf of the firm; but no case decides the proposition that, where there is a negociable instrument, on its face made payable to A B, or order, any one, except A B, or his indorsee, can maintain an action upon it. Mr. *Kernan* referred us to several cases; but it appears clear, that a party who sues upon a negociable instrument must make title thereto, and title cannot be made by a mere allegation that it was given for his use. A right to sue is vested only in the party to whom the note is payable, though that party may possibly be a trustee for others when the money is recovered. Here there is an allegation that it was made to the public officer, for the benefit of the Bank. We have not been referred to any section of the Act of Parliament showing that the public officer has any other function than that of carrying on suits. The contract here is declared on as having been made with the public officer of the Bank, though he has a right to sue only as a nominal plaintiff.

We are of opinion, so far as this count is founded upon a promissory note, which implies consideration *per se*, that the demurrer must be overruled, and that the defendant is entitled to the judgment of the Court. Mr. *Lynch* endeavoured to support the count, upon the ground that, inasmuch as it stated that the note had been given for the benefit of the Bank, and was over-due, it might be considered as a count not upon the note itself, but upon the consideration for which the note was passed. But the count was not framed with this

M. T. 1857.
*Common Pleas.*
M'DOWELL
v.
DOYLE.

view; and although the technical rules of pleading have been abolished, yet if a man want to sue on the consideration for the note, he must state what the consideration is. If the consideration had been stated, and it turned out that that consideration moved from the Company, the question might then arise, whether the action might be thus maintainable? upon which subject we offer no opinion.

This count, however, is clearly framed upon the note, and not upon the consideration; and therefore, upon these grounds we give judgment for the defendant.

Demurrer overruled.

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## OLDEN *v.* STOKES.

H. T. 1858.
*Jan.* 29.

The plaintiff, in an action of ejectment upon the title, had, prior to the termination of the tenancy of the defendant (who was a yearly tenant) by notice to quit, demised the lands to D. for the year succeeding the defendant's tenancy. The plaintiff was unable to induce D. to join in the ejectment as co-plaintiff, and had been threatened by D.'s attorney (who was also attorney for the defendant) with legal proceedings, for breach of agreement. The defendant alleged that he had a good defence to the action (independent of the tenancy of D.), but refused to disclose the nature of it. Motion to stay the defendant from relying on D.'s tenancy, as being merely a temporary bar, granted.

THIS was an application to compel the defendant to waive temporary bars in an action of ejectment.

The action was brought to recover possession of the lands of Poulavere, in the county of Cork, which had been demised to the defendant by the plaintiff, for the term of one year ending the 25th day of March 1857. The defendant took defence, and notice of trial had been served for the last Summer Assizes of the county of Cork, but had been withdrawn before the case came on for trial, for the following reason:—The plaintiff, previous to the expiration of the defendant's tenancy, had signed an agreement (which was not sealed), by which, in consideration of a sum of money, he had promised to let the lands to one Patrick Duane for the year succeeding the defendant's tenancy, and expiring upon the 25th of March 1858; but it was stated in an affidavit, made by the plain-

tiff's attorney, that he had heard and believed that the plaintiff had failed in obtaining permission from Patrick Duane to use the name of the latter as co-plaintiff in the present action. The plaintiff had also been threatened by the attorney of Patrick Duane (who was also the attorney of the defendant in this action) with legal proceedings, for having failed in his agreement to let Patrick Duane into possession of the lands upon the 25th of March 1857. The present application was for the purpose of preventing the defendant from relying upon the demise made to Patrick Duane, by way of defence to the action of ejectment, as being merely a temporary bar, and upon the ground of collusion between him and the defendant, arising out of the fact that the same attorney was acting for both of them. The defendant's Counsel stated, upon the hearing of the motion, that the defendant had another good defence to the ejectment.

*J. Clarke*, in support of the application.

The 89th section of the Common Law Procedure Amendment Act (1856) enables Courts of Common Law, in cases of ejectment on the title, to order the defendant to waive temporary bars, in cases where the Court of Chancery would make an order to the same effect. This order becomes necessary in the present case, the landlord being unable to obtain the consent of Duane to become a co-plaintiff; and it has been decided by the Court of Queen's Bench in this country, that a person cannot be compelled to allow his name to be used as party to a suit, except in cases where such person stands in the position of trustee. The interest of Duane in these premises only amounts to an *interesse termini*.

*E. Sullivan*, contra.

The interest of Duane is something more than a temporary bar; for the landlord made what must be regarded as an assignment of his right to the possession of these lands to Duane.—[MONAHAN, C. J. This is not an assignment; if anything, it is only a lease.]—Even supposing it to be no more than a lease, the landlord has parted with the possession, which is the foundation of the right to recover in ejectment. A temporary bar, such as a

H. T. 1858.
*Common Pleas.*
OLDEN
*v.*
STOKES.

Court of Equity will deal with, is an estate created *prior* to the estate sought to be established; as, for instance, when the suit is between heir and devisee, a lease granted prior to the will, by a person not a party to the suit, will be regarded as a temporary bar; whereas, in the present case, the estate which is contended to be a temporary bar was made by the plaintiff himself, subsequent to the inception of his own estate in the lands. It must be regarded as an assignment *pro tanto* of the lessor's right to the possession. If it does not amount to a grant of the reversion, consequent upon the defendant's lease, this motion is futile; if it does amount to such a grant, it is a valid and not merely a temporary bar to the plaintiff's right to recover.—[MONAHAN, C. J This instrument was not under seal, and therefore could not pass the reversion consequent upon the defendant's estate; therefore it can only be regarded as a lease from the 25th of March 1857 to the 25th of March 1858. Supposing this to be so, is there any case showing that a Court of Equity will not afford relief when the estate, which is sought to be removed as a temporary bar, has been created by the person himself who makes the appplicaton?]—It does not appear that an application identical with the present one has ever been made; but similar applications have been refused: *French* v. *Coppinger* (*a*). There is no positive evidence of collusion. It may be proper to state that the defendant relies upon another defence to the action, in addition to that founded on the lease made to Duane, but has not thought fit to disclose it to the opposite party upon the present motion. No affidavit has been made by the landlord himself; and his attorney only states that he heard and believed that Duane was asked to become a co-plaintiff.

*J. Clarke* was heard in reply.

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MONAHAN, C. J.

*Jan.* 29.

We are of opinion that the motion in this case must be granted, and that the plaintiff is entitled to an order restraining the defendant

(*a*) 6 Ir. Chan. Rep. 568, 577.

from setting up the lease made to Duane, on the ground that if he filed a bill in the Court of Chancery, for the purpose of restraining the defendant from relying upon this lease, and so preventing the trial of the real question in this ejectment, he would succeed. It appears that Mr. Olden has brought an ejectment, for the purpose of recovering his estate in these lands. Now the general rule is, that a party bringing an ejectment cannot recover, unless he be entitled to the possessory interest in the lands for which the ejectment is brought, an ejectment being in form an action for the *possession.* But Courts of Equity have for several years been in the habit of holding that, although a plaintiff is not entitled to the possession of the lands, still, if he be entitled to the property in them, the defendant will be restrained from setting up the title of an intermediate party to the possession, in order that the real title may be tried. This generally occurs in cases where the outstanding terms or temporary bars are prior to the title of both plaintiff and defendant; as where tenancies have been created by the proprietor of an estate, and the right to the estate is afterwards in dispute between his devisee and heir; in which cases it is a matter of course to set aside such temporary bars, because the possession of the tenant prevents the trial of the real question at issue. Here the ejectment is brought by Mr. Olden, claiming to be entitled to this property; the defendant takes defence; and we are not in a position to know what title he sets up in these lands; for he says, "I will keep my title secret, and not disclose it until I think fit;" but he does not found his title as derived under the lease, the existence of which he sets up as a bar to plaintiff's recovery.

Therefore there being this difficulty, and the documentary evidence satisfying us that the plaintiff finds a difficulty in obtaining permission to use the name of the tenant as co-plaintiff, we are of opinion (without imputing collusion) that this is a case in which a Court of Equity would prevent Mr. Stokes from setting up this defence, and aid Mr. Olden in obtaining a trial of the real question at issue, if, in fact, there is any such question; and therefore, without prejudice to the defendant's rights, we think that this is such a temporary bar as should be waived.

H. T. 1858.
*Common Pleas.*
OLDEN
*v.*
STOKES.

BALL, J.

If the only question in this case was the right of possession, we might have some difficulty in dealing with the present motion; but there are peculiar circumstances in this case, for we have been informed by Mr. Stokes' Counsel, that he does not rely, as a defence to the action, upon the right of possession, but that he intends to set up some other defence, of the nature of which he does not inform us. This alters the case altogether, and brings it within that class of cases, of which we are all aware, in which Courts of Equity interfere for the purpose of compelling a party to waive temporary bars, where the real question to be tried is of quite a different nature from that set up. The only question therefore is, whether there are in this case materials sufficient to induce a Court of Equity to make such an order? and I am of opinion that there are; and that a Court of Equity would never allow the defendant to set up the title of Duane (the more especially when they have the same attorney acting for them both), so that the latter, by interposing his title, might give effect to that of the defendant. I conceive that these circumstances present a case of collusion quite sufficient to induce a Court of Equity to interpose.

KROGH, J.

I am also of opinion that this motion should be granted; for I have no doubt that if the facts that have come before the Court were spread out upon a bill in Equity, the Court of Chancery could have no hesitation in granting the relief sought.

CHRISTIAN, J., concurred.

Rule accordingly.

## EDE *v.* SCOTT.

*Jan.* 27.

In an action for oral slander, the plaintiff complained that the defendant spoke, of and concerning him, these words amongst others:—"There is no doubt he abstracted it" (meaning that the plaintiff stole a part of the cable). The defendant pleaded that it had been rumoured that the article in question "had been taken" by some one of a party consisting of the plaintiff, defendant and others, who were at the time in the employment of the Lords of the Admiralty, and that the defendant, in order to clear his reputation, had spoken the words complained of *bona fide* and without malice, believing them to be true, and that the occasion was privileged.—*Held*, that inasmuch as the plea admitted that the words had been spoken in the sense charged in the summons and plaint, viz., as imputing felony, and as the defendant had not pleaded that the alleged rumour imputed felony to the party, the occasion did not warrant the accusation complained of, and that the communication was therefore not privileged.

This was an action for oral slander.—The summons and plaint alleged that the defendant, in the month of August, in the year 1857, in a discourse which he had with one Robert Franklin and other persons, of and concerning the plaintiff, falsely and maliciously spoke the following words, concerning the plaintiff, to the said Robert Franklin:—"You have heard of this disgraceful affair of Ede's having taken "(meaning stolen) that piece of cable Moriarty showed us in his cabin;" to which Franklin replied, "Yes; but is it possible that a man in "his position would compromise himself by taking a paltry thing "like that? Besides, he could not have intended to steal it, as he "told Lewis and myself, on his return from the ship, that Mr. "Moriarty gave it to him;" and the defendant said, "There is "no doubt he abstracted it (meaning thereby stole it), for read that," handing at the same time a letter from Moriarty to one Richard Stokes, which Robert Franklin having read, said, "Well that is most disgraceful if he did it" (meaning if the plaintiff stole the piece of cable); to which the defendant replied, "He did (meaning that "the plaintiff did steal it), for Moriarty went to his house yesterday "morning, and caught him by the hand and said, 'I suppose you "are done with my piece of cable now, which you took yesterday;' "when Mr. Ede made a move, but he (Moriarty) held his hand, "and Mr. Ede then asked Mrs. Ede for the piece, and returned "it to Mr. Moriarty."

There was a second count, detailing a similar conversation between the defendant and another person named Lewis, relative to the same transaction.

The defendant pleaded that the words spoken amounted to a

H. T. 1858.
*Common Pleas.*
EDE
*v.*
SCOTT.

privileged communication, upon the following grounds:—That before the time of the speaking of the words mentioned in the summons and plaint, the defendant, the plaintiff and Robert Franklin, therein named, were in the employment of the Lords of the Admiralty, and stationed at Haulbowline Island, and that her Majesty's ship Agamemnon was lying at that time at Queenstown, and had on board the electric telegraph cable, and that Henry Moriarty, in the summons and plaint mentioned, was an officer on board that ship; and that the plaintiff, the defendant and several other persons in the employment of the Admiralty, went in a party from Haulbowline, with some members of their families, on board the Agamemnon, and that they were invited by Henry Moriarty into his cabin, and were shown by him a small piece of the electric cable, belonging to him; and that after the party had left the cabin, the piece of cable was missed by Henry Moriarty, who shortly after, by letter, informed one Richard Stokes, the acting master attendant on the island, and in the service of the admiralty, that he (Moriarty) had received the plaintiff and his friends on board the Agamemnon, and had shown them the piece of the telegraphic cable, and that shortly after they had gone he had searched for it in vain, and that he thought that the plaintiff had taken it. That upon the following morning, Henry Moriarty went to Haulbowline Island, and saw the plaintiff, and required from him the piece of cable, and that the plaintiff gave it up to him; and that the defendant had been informed of the latter fact before he spoke the words complained of. That before the speaking of the words, it was rumoured through the island, and on board of some of her Majesty's ships stationed at Queenstown, that a party of persons in the employment of the Admiralty, with their families, had gone from Haulbowline on board the Agamemnon, and that the piece of cable had been taken by some one of them from Moriarty's cabin, and without his knowledge or permission, and that the defendant had heard this report, and also facts similar to those detailed in Moriarty's letter to Stokes. That such a report was a reflection upon the person and character of whichsoever party had taken the piece of cable, and that it was the moral duty of the defendant, as one of the party, and also as

an officer employed by the Admiralty on the island, to take care that no imputation should remain upon his character in relation to the said cable, particularly amongst persons employed by the Admiralty, and that it was also his duty to inform Robert Franklin of the real facts connected with the taking of the piece of cable, and the name of the taker, in order to remove any imputation from the defendant's character; and also that the other persons before whom he spoke the words were in the employment of the Admiralty at Haulbowline; and that he spoke the words believing them to be true, *bona fide* and without malice.

There was a similar plea of privileged communication to the second count.

Demurrer—upon the ground that the circumstances detailed in the defence did not amount to a privileged communication.

*Clarke* and *Jones*, in support of the demurrer, cited *Twogood* v. *Spyring* (*a*); *Harrison* v. *Bush* (*b*); *Brown* v. *Croome* (*c*); *Clarke* v. *Roe* (*d*); *Tusan* v. *Evans* (*e*); *Martin* v. *Strong* (*f*).

*Macdonogh* and *Exham*, in support of the pleadings, cited *Cooke* v. *Wildes* (*g*); *Ruckley* v. *Kiernan* (*h*); *Atkinson* v. *Congreve* (*i*); *Somerville* v. *Hawkins* (*k*); *Taylor* v. *Hawkins* (*l*); *Coxhead* v. *Richards* (*m*); *Davis* v. *Reeves* (*n*); *Wright* v. *Woodgate* (*o*); *Shipley* v. *Todhunter* (*p*); *Cowan* v. *Wellington* (*q*); *Stephen's N. P.*, pp. 22, 25.

MONAHAN, C. J.

We are of opinion that the facts of this case do not show that there existed an occasion sufficient to justify the accusation of felony made by the defendant.

Demurrer allowed.

(*a*) 1 Cr., M. & R. 193.
(*b*) 5 Ell. & Bl. 348.
(*c*) 2 Stark. 297.
(*d*) 4 Ir. Com. Law Rep. 1.
(*e*) 12 Ad. & Ell. 773.
(*f*) 5 Ad. & Ell. 535.
(*g*) 5 Ell. & Bl. 335.
(*h*) 7 Ir. Com. Law Rep. 75.
(*i*) 7 Ir. Com. Law Rep. 109.
(*k*) 10 C. B. 583.
(*l*) 16 Q. B. 308.
(*m*) 2 C. B. 569.
(*n*) 5 Ir. Com. Law Rep. 79.
(*o*) 2 Cr., M. & R. 573.
(*p*) 7 C. & P. 680.
(*q*) 7 C. & P. 531.

H. T. 1858.
*Queen's Bench*

# THE QUEEN, at the relation of PHILIP M'ENROE, PATRICK MURTAGH and FRANCIS SILLERY,

*v.*

# PHILIP BRADY, JOHN MAGUIRE, OWEN GAVIN and JAMES BRADY.*

*(Queen's Bench.)*

*Jan.* 25.

Upon an application for a *quo warranto* information, to question the election of Town Commissioners, under the Towns Improvement Act (Ireland) 1854 (17 & 18 *Vic.*, c. 103), the Court, in order to carry out the objects of the Act effectually, will, in every case, as far as it possibly can, adjust disputes arising out of elections under that Act, when the facts appear sufficiently upon the affidavits.

A person who had been an insolvent debtor twelve years previously, but ever since that time had been in solvent circumstances, was elected Town Commissioner. *Held*, that the previous insolvency created no disqualification under the 17 & 18 *Vic.*, c. 103, and 10 *Vic.*, c. 16, s. 8.

In order to be qualified to vote in the election of Town Commissioners, the voter must have actually *paid*, and not merely tendered, the amount due for county cess, in respect of the premises for which he is rated. It must also appear upon the rate-book that he is rated in respect of tenements within the borough, occupied by him, to the net annual amount of £4. A general rating to a much larger amount, in respect of tenements partly within and partly without the borough, is not a qualification.

A voter is disqualified from voting in the election of Town Commissioners, by demising part of the premises, whereby the net annual value of the part in his own occupation is reduced below £4 per annum.

A voter, who stated to the Returning-officer that he had voted before at the same election, was properly rejected, although such statement might have been made through misrepresentation or mistake.

A Town Commissioner, who has been served with the conditional order for a *quo warranto*, but disclaims the office, is entitled to costs of appearing by Counsel.

*Quære.*—Will the Court entertain an objection to a voter, which was not taken at the election of the Town Commissioners?

SIR C. O'LOGHLEN had, on the 14th of January instant, obtained a conditional order for an information in the nature of a *quo warranto* against the defendants, requiring them to show cause why their election as Commissioners of the Town of Kells should not be set aside, upon the ground of the improper rejection and reception of votes by the Returning-officer at such election; and also upon the ground of the personal disqualification of the defendant James Brady as such Commissioner, by reason of his insolvency, twelve years before the said election.

* *Coram* LEFROY, C. J., and PERRIN, J.

It now appeared by the affidavit of the relators, that in and previous to the year 1855, the borough of Kells was regulated by the 9 *G.* 4, c. 82, and that in the same year the proper preliminary steps having been taken, the borough was placed under the provisions of "The Towns Improvement Act (Ireland) 1854" (17 & 18 *Vic.*, c. 103). That the number of the Commissioners for the borough was fifteen. That on the 15th of October 1857, five of the Commissioners retired in the usual order of rotation, and that on the same day an election was duly holden for the purpose of electing Commissioners in the room of the five retiring Commissioners, at which election James Killeen, the chairman of the Commissioners, and a Justice of the Peace, presided. That upon that occasion, amongst other persons, the relators and the defendants offered themselves as candidates, and that the defendants and V. J. Gray were declared to have been duly elected. That at the said election, the votes of the six following persons were received in favour of the defendants, although it was duly objected that they were not entitled to vote; upon the following grounds, viz., H. Sheridan, because his name did not appear upon the rate-book for the borough of Kells as rated for any tenement therein to the relief of the poor; J. Killeen, upon a ground which was abandoned in the course of the argument; P. M'Manus, because he had only part of the house out of which he was rated, in his possession or occupation, which part was not of the annual value of £4, the remaining part thereof being set to a person who had a separate and distinct entrance thereto, and the key of the outer door thereof, and also, because the voting paper signed by the said P. M'Manus omitted to state the right in which he claimed so to vote; J. Caffrey, because he did not occupy a house of the value of £4 a-year; and R. Murray and R. Lord, because they had not paid the county cess then due. And the relators alleged that, had not these six votes been received, and had not the said J. Killeen improperly refused to receive or record the votes of P. M'Enroe, T. Lees and John Brady, together with those of three other persons named, who were in all respects duly qualified to vote, that the defendants would not have had

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
BRADY.

a majority of votes. It was admitted, however, that if five votes were added to those respectively recorded for the relators at the election, or five struck off those recorded for the defendants, that it would be sufficient to give them a majority of votes. It also appeared, by the affidavit of the relators, that, at the time of declaring the poll, notice in writing had been duly served by the relators upon the said J. Killeen, as such Returning-officer, protesting against the return of the defendants; and that the defendant James Brady had been an insolvent, and that his schedule still remained on the files of the Insolvent Court in Ireland, and that consequently, by virtue of the Towns Improvement Act (Ireland) 1854, and the Acts incorporated therewith, the said James Brady was disqualified from being or continuing to be such Commissioner. By the affidavits which were filed on the part of the defendants, it appeared that James Brady had been discharged under the Insolvent Act in 1846, as an insolvent debtor; but that since that time he had never been arrested for debt, nor had he compounded with his creditors, or taken or applied for the benefit of the Insolvent Act, and that he was then, and for many years had been, in solvent circumstances, and had for several years previously served as a Commissioner under the 9 *G.* 4, c. 82, without objection. It also appeared by the affidavit of the said J. Killeen, the Returning-officer, that of the six votes rejected by him, three were rejected, having been duly objected to, for want of satisfactory evidence of the payment of the county cess presented at the Spring Assizes 1857. That he rejected the vote of P. M'Enroe, upon its having been duly objected to, because, although he appeared upon the rate-book as occupying a house and lands, both within and beyond the limits of the borough of Kells, yet it could not be ascertained from the entry in the rate-book what part of the property was within the boundary of the borough, and therefore that he was not rated as the occupier of a house of the annual value of £4, within the borough, as required by the Act. That he rejected the vote of the said T. Lees, although duly rated to the value of £5 yearly, upon the admission of the said T. Lees that he had demised part

of the premises so rated, and had not since been in occupation of the whole of the said premises. That he rejected the vote of the said John Brady, because, upon tendering his vote, he admitted that he had previously voted at the same election. That he received the votes of the said H. Sheridan, R. Murray and R. Lord, believing them to be duly qualified to vote, and because no objection was made to the reception of the same votes; and that the said R. Lord, on the day of the said election, had *tendered* the amount of the county cess, presented at the last Spring Assizes, to the deputy collector, who refused to accept it. That he received the vote of the said J. Caffrey, because he appeared upon the rate-book as duly rated for two tenements within the said borough, together of the net annual value of £5. 5s.; and that he had received the vote of the said P. M'Manus, because it did not appear that he had *demised* any part of his house, the person who was in occupation of part of it residing there merely by permission of the said P. M'Manus, without paying or having agreed to pay rent therefor.

The defendant Owen Gavin, who had been served with the conditional order, stated that he had been elected a Commisssioner without his consent, and had not acted, and did not intend to act, in the office.

*Macdonogh* (with him *E. Hayes*), on the part of the defendants, except Owen Gavin, now showed cause.

*H. Smythe*, for the defendant Owen Gavin, asked to have the conditional order discharged, as against him, with costs.

Sir *C. O'Loghlen* and *A. Hamill*, in support of the conditional order.

James Brady is disqualified as a Commissioner, by the 8th section of the Commissioners Clauses Act 1847,* which is incorporated

* 10 *Vic.*, c. 16, s. 8.—"No bankrupt or insolvent, or person not qualified as required by the Special Act, shall be capable of being or continuing a Commissioner."

H. T. 1858.
*Queen's Bench*
THE QUEEN
*v.*
BRADY.

with the Towns Improvement (Ireland) Act 1854. He admits in his affidavit that he has been an insolvent. The object of the Legislature was to assimilate the law in this respect with that relating to the House of Commons; and therefore, James Brady, until he takes his schedule off the files of the Insolvent Court and pays his former debts, cannot be qualified to act as a Commissioner. We have shown, by affidavit, a fair case for inquiry, which is a sufficient ground for issuing a *quo warranto;* the principle is laid down in *Regina* v. *Quayle* (*a*).

*E. Hayes*, in reply.

As to the insolvency of James Brady; the construction of the 10 *Vic.*, c. 16, s. 8, which is contended for upon the other side, is untenable, for the effect of it would be, that if a person, at any distance of time, however remote, has been a bankrupt or insolvent, he is for ever disqualified; there is no way in which he can get rid of that disqualification; and this too, no matter however solvent or affluent in his circumstances he may afterwards become. The true construction of the Act is, that the party is not disqualified, unless he be bankrupt or insolvent at the time of the election. The practice of the House of Commons in Ireland was regulated by the 19 & 20 *G.* 3, c. 25, s. 9, which applies only to the case of a Member of Parliament becoming bankrupt, and makes no mention of insolvency. As to the rejection of Lord's vote; a tender of rates is not enough to qualify a person to vote at the election of Commissioners; the 17 & 18 *Vic.*, c. 103, s. 22, requires an actual payment of the rates. As to the vote of M'Manus; there is merely an occupation of part of the premises by permission, and no tenancy as to such part is created between the occupant and the owner of the premises; that does not occasion a disqualification, if the premises be rated to the proper amount, the occupation being that alone of the owner, and the occupant being nothing more than his servant or visitor: *In re Gorman* (*b*). As to the vote of P. M'Enroe, it makes no difference that the property within the borough be

(*a*) 11 Ad. & El. 508.

(*b*) 1 Ir. Law Rep. 282.

rated in different portions; all the law requires is that the party has been in possession of the rated premises. Where a party is rated in respect of property, both within and without the borough, it lies upon him to show what part of the property is within the borough; the Returning-officer cannot go into that question. The onus of proving a twelve months' previous occupation of premises, as required by the 17 & 18 *Vic.*, c. 103, s. 22, lies upon the party seeking to exercise the franchise.

LEFROY, C. J.

The question in this case is as to the qualification of three Commissioners; one of whom, a Mr. James Brady, is objected to, on the ground of having been at one time an insolvent; and two others, on the ground of a want of a majority of votes at the election of Commissioners for the Town of Kells. We have purposely gone into a very minute examination of this case; we have taken upon ourselves trouble, which perhaps we might have declined, and sent the parties to go before a jury to have the facts examined into. But we think it due, in order to carry out this Act of Parliament, that the Court should go as far as it possibly can, in every case, to adjust disputes which arise in elections under the Act, and to dispose of the questions as far as possible, where there is no serious doubt as to matters of fact, any more than as to matters of law. This we should do for the sake of the peace of the town.

Now, first, as to the personal qualification or disqualification of James Brady. In order to establish a personal disqualification, it is suggested that, about ten or twelve years ago, he took the benefit of the Insolvent Act; but it appears that he was duly discharged, and therefore, at that time, he had fulfilled all the requisites which entitled him, as a person seeking to have the benefit of the Insolvent Act, to obtain his discharge. The Act of Parliament* now in

* The exact words of the 10 *Vic.*, c. 16, s. 8, are:—"No bankrupt or insolvent, or person not qualified as required by the Special Act, shall be capable of being or continuing Commissioner." This section is incorporated with the Towns Improvement (Ireland) Act 1854, ss. 25, 26.

H. T. 1858.
*Queen's Bench.*
THE QUEEN
*v.*
BRADY.

question says, that any person who is a bankrupt or an insolvent shall be incapable of being or continuing a Commissioner. It would be a monstrous construction to give to this Act, to hold that it meant to exclude a person who, at any remote period of time, had taken the benefit of the Bankrupt or Insolvent Act, and who had thereby purged the disqualification. It would be to give the Act of Parliament a retrospective construction, in order to raise a disqualification. We cannot think that that would be the due construction of the Act; and we are, therefore, of opinion that Mr. Brady was an eligible and qualified person to be elected, and that, as to him, there is no ground for issuing a *quo warranto*.

Next, with respect to the two remaining Commissioners; it is said that they have not been elected by a majority of voters. It is admitted that a question may be raised as to six of the voters on each side; and it is alleged that six votes which were received on the side of the majority ought to be struck off, and that six votes which were rejected on the other side ought to be added; and that if that were done, that these two remaining Commissioners would not be duly elected. It is admitted that Mr. Killeen's vote is to be taken out of the six votes which were received, and therefore the votes upon which we are to come to a decision amount to five; because it is admitted that there must be an alteration, to the amount of five votes at least, made in the poll, in order to disturb the election. We are satisfied that, to the extent of three votes, a disqualification has been made out. We say this, however, without meaning to intimate any opinion upon a point which we think very material, but which, not being necessary to be decided here, we refrain from expressing any opinion upon—namely, whether the Court will go into an objection not taken at the election? As to Sheridan, we are satisfied that an objection was taken, and his disqualification is beyond all doubt; but it does not appear, or at least it is very doubtful, whether any objection was taken to the other two voters, who, it is argued, were disqualified, upon the ground of not having paid their taxes. We act, with respect to that, upon the construction of the statute, taking it literally, "they had not paid,"

therefore they are disqualified. One of them (Lord) *tendered* the amount; but as to him, the question whether an objection was made or not may arise—taking it, however, to have been made, and that these two persons were thus disqualified, this would make three votes to be taken off. Then it is necessary, in order to make the requisite alteration in the poll, that, besides these three votes to be taken off from the majority, two votes should be added to the minority; and it is stated that, amongst the votes rejected, are unquestionably to be found three votes which ought to have been received; but we are of opinion, that the relators have failed to establish a right to add any one of these three votes. The first is the vote of M'Enroe. We are clearly of opinion that he did not show, upon the face of the rate-book, that he was properly rated. We have already stated the reason—namely, that he did not show that he was rated in respect of premises within the borough, occupied by him, to the net annual value of £4. It matters not how largely he may be rated in respect of land in other parts of the union: the qualification must be within the limits of the town of Kells; and as no such qualification appears, he is not qualified.

Well then as to the second vote, that of Lees; he admitted distinctly that he had demised part of the premises—he admitted, therefore, that he was disqualified; and why should we send this to be inquired into by a jury?

As to the third vote, that of John Brady; he stated that he had voted before; and are we to allow a party, whether he gave such answer from motives of misrepresentation or even by mistake at the time of the election, afterwards to turn round (and the officer having duly discharged his duty, and rejected him upon his own admission), are we to set aside the election, because he now comes forward, and, without denying the fact, says he made a mistake? Are we to set the whole matter afloat again on such a ground as that? We cannot do it. There is also one circumstance which weighs much with us. It appears upon the whole examination, that the Returning-officer has acted fairly and dispassionately, and we see no grounds for imputing any sinister motives to him. That is an additional reason

H. T. 1858.
*Queen's Bench.*
THE QUEEN
*v.*
BRADY.

for our not setting aside the election, and disturbing the peace of the place again.

We, therefore, refuse to grant the *quo warranto*, and allow the cause shown, with costs.

The parties who were served with the conditional order, and appeared by Counsel upon this motion, must have their costs.

PERRIN, J., concurred.

H. T. 1858.
*Exch. Cham.*

## Exchequer Chamber.

## GOVERN *v.* ROWLAND.*

*(Error from the Court of Queen's Bench.)*

*Feb.* 3.

In an action of trespass, the defendant justified, relying on a civil-bill decree against the plaintiff and two others.—Replication, that one of the defendants in the civil-bill was out of the jurisdiction of the Assistant-Barrister, and that service of the civil-bill process had not been duly effected; and also that the Assistant-Barrister had been induced to sign an original civil-bill decree, under which the arrest had been made, instead of a renewal of a former decree.—*Held*, affirming the decision of the Court of Queen's Bench, that fraud in obtaining the decree could not be relied upon, inasmuch as it was not distinctly alleged upon the pleadings; and that it being the duty of the Assistant-Barrister, under the Civil-Bill Act (14 & 15 *Vic.*, c. 57, s. 65), to satisfy himself of the residence of the defendants within the jurisdiction, and of the due service of the process, the decree, not having been appealed from, was conclusive.

THE pleadings are fully set out, *ante*, p. 218. From the judgments then pronounced, a writ of error having been brought—

*D. Lynch* (with him *O'Driscoll*), for the plaintiff in error, cited, in addition to the cases relied on in the argument in the Court below, 1 *Wms. Saunds.*, p. 189; *Jones* v. *Owen* (*a*); *Condon* v. *Kingston* (*b*); *Longf.*, *C. B.*, 2nd ed., p. 47.

*Battersby* (with him *J. A. Curran*), for the defendant in error, cited the following additional cases. The decision of the Assistant-Barrister, as to the due service of the process, not having been appealed from, is conclusive, and not examinable in this Court: *Robinson* v. *Lenaghan* (*c*); *Hilyard* v. *Day* (*d*). The Civil-bill Court is a Court of Record: 14 & 15 *Vic.*, c. 57, s. 97; and the decree of a Court of Record cannot be contradicted: *Co. Litt.*, p. 260, *a*; *Rex* v. *Carlile* (*e*); 2 *Smith, L. C.*, 4th ed., p. 608; *Molins* v. *Werby* (*f*). The proceedings of Inferior Courts, not being Courts of Record, are examinable in the Superior Courts:

(*a*) 5 D. & L. 669. (*b*) 7 Ir. Jur. 247.

(*c*) 2 Exch. 333.

(*d*) 1 Jo. 270; cited in *Coffee* v. *Rahily*. (*e*) 2 B. & Ad. 362.

(*f*) 1 Lev. 76; S. C., 1 Sid. 94; S. C., 1 Keb. 355.

* *Coram* MONAHAN, C. J., PIGOT, C. B., BALL, KEOGH and CHRISTIAN, JJ., PENNEFATHER, RICHARDS and GREENE, BB.

H. T. 1858.
*Exch. Cham.*
GOVERN
*v.*
ROWLAND.

*Thompson* v. *Blackhurst* (*a*); *Ferguson* v. *Mahon* (*b*); *Caulfield* v. *Hutchinson* (*c*); but the principle established by those cases does not apply to the present case. The Civil-bill Court is a Court of competent jurisdiction; its decree, therefore, is final: *Mould* v. *Jones* (*d*): and "if an inferior tribunal has general jurisdiction of "a matter, whatever mistakes that tribunal makes, this Court will "not inquire into them;" *per* Crampton, J., in *Ex parte Henn* (*e*); *Re Clarke* (*f*), judgment of Lord Denman, C. J.; *Ayrton* v. *Abbott* (*g*), judgment of Patteson, J.: *Noell* v. *Wells* (*h*); *Allen* v. *M'Pherson* (*i*). It is not necessary for the defendant to rejoin the decree as an estoppel: 2 *Smith, L. C.*, 4th ed., pp. 623, 624, citing *Trevivan* v. *Lawrence* (*k*); 1 *Wms. Saund.*, p. 325, *d*, n. 4; 1 *Chit. Pl.*, 5th ed., pp. 634, 635; *Bowman* v. *Taylor* (*l*); *Lewis* v. *Willis* (*m*); *Curtis* v. *Spitty* (*n*). It cannot be argued that the decree was obtained by fraud, because fraud is not expressly alleged upon the pleadings: *Jones* v. *Roberts* (*o*); *Beamont's case* (*p*); *Pease* v. *Naylor* (*q*); *Moore* v. *Barlow* (*r*); *Shedden* v. *Patrick* (*s*); *Meddowcroft* v. *Huguenin* (*t*). A general demurrer is not an admission of facts which are not sufficiently pleaded: *Weston* v. *Carter* (*u*); *Holford* v. *Platt* (*v*); *Zouch* v. *Bamfield* (*w*.)

*D. Lynch* replied.

MONAHAN, C. J.

We entertain no doubt in this case. We are all of opinion, that the decision of the Court of Queen's Bench was quite right. With

(*a*) 1 N. & Man. 266, 273.
(*b*) 11 Ad. & El. 179.
(*c*) 3 Ir. Jur. 371.
(*d*) 5 Q. B. 469.
(*e*) 6 Ir. Com. Law Rep. 239, 243.
(*f*) 2 Q. B. 619, 633.
(*g*) 14 Q. B. 1, 23.
(*h*) 1 Lev. 235, 236.
(*i*) 5 Beav. 469; S. C., on appeal, 1 H. L. Cas. 191.
(*k*) 2 Ld. Ray. 1049, 1051.
(*l*) 2 Ad. & El. 278.
(*m*) 1 Wils. 314.
(*n*) 1 Bing., N. C., 15.
(*o*) 2 Cr. & M. 219.
(*p*) Lat. 111.
(*q*) 5 T. R. 80.
(*r*) Nap. C. B., 1st ed., 131.
(*s*) 1 Macq. H. L. Cas. 555, 615.
(*t*) 4 Moo. P. C. 386.
(*u*) 1 Sid. 9, 10.
(*v*) 2 Rolle, 22.
(*w*) 1 Leon. 75, 77.

respect to the question of fraud, we are of opinion it is not raised in the case. If it were intended to raise any such question, it should have been distinctly alleged that the decree was fraudulently obtained. The case being therefore free from the allegation of fraud, we consider the 65th section of the Civil-bill Act conclusive on the other points in the case. Under that section, it was the duty of the Assistant-Barrister, before pronouncing his decree, to be satisfied of the residence of the defendants, or of their having a shop or place of business within the jurisdiction of the Court, as required by the Act; and also that process was duly served on them, as required by the Act. And we are of opinion that the decree of the Assistant-Barrister, unappealed from and unreversed, is conclusive evidence that the same was proved to his satisfaction; especially in a case like the present, where, by the residence of two of the defendants within the county, the case was one over which the Assistant-Barrister had jurisdiction, at all events as against those so resident.

The judgment of the Court of Queen's Bench will, therefore, be affirmed, with costs.

H. T. 1858.
*Exch. Cham.*

## M'ANDREW *v.* THE ROYAL IRISH BEET-ROOT SUGAR AND SUGAR REFINING COMPANY.*

*(Error from the Queen's Bench.)*

*Feb.* 3.

Upon error being brought, and the judgment of the Court below reversed, the Court of Exchequer Chamber has no jurisdiction to award restitution, but will remit the record to the Court below, to be dealt with there.

In this case an action had been brought for goods sold and delivered, and goods bargained and sold. Upon the trial, before Lefroy, C. J., at the Sittings after Easter Term 1857, a verdict was found for the plaintiff; and the learned Judge having refused to respite execution, the amount recovered in the action, together with the costs, was paid by the defendants. The exceptions which had been taken at the trial were overruled by the judgment of the Court of Queen's Bench (*a*); but upon error being brought, that judgment was reversed by the Court of Exchequer Chamber (*b*), and a *venire de novo* awarded.

*Macdonogh* (with him *D. M'Causland*) now applied for an order for restitution of the sum which had been paid to the plaintiff in the action, and for the costs of the proceedings in error. Under the former practice, this application should have been made to the Court below: *Archb. Prac.*, 8th ed., p. 511; but a difficulty is now caused by the effect of the Common Law Procedure Act 1853, ss. 177, 178, and the Common Law Procedure Act 1856, ss. 42, 48. —[Greene, B. The fact of payment is not upon the record before this Court; the record concludes with the judgment of the Court below.]—The question is, do the Common Law Procedure Acts transfer the powers of the Court below, in this matter, to the Court of Error?—[Pigot, C. B. The Court of Error is not the Court of Appeal; the judgment given by the Court of Appeal is similar to the judgment given by the Court below.—Monahan, C. J. This

(*a*) 9 Ir. Jur. 326. (*b*) 10 Ir. Jur. 218.

* *Coram* Monahan, C. J., Pigot, C. B., Ball, Keogh, and Christian, JJ., and Pennefather, Richards and Greene, BB.

H. T. 1858.
*Exch. Cham.*
M'ANDREW
*v.*
BEET SUGAR
COMPANY.

proceeding is brought forward by suggestion of error, and not by way of appeal. The Common Law Procedure Amendment Act 1856 makes the Exchequer Chamber a Court of Appeal for the purposes of that Act; but the difficulty is, has this Court, sitting as a Court of Error, the power to order restitution? The Judges of the Queen's Bench, when they get back the record, will have full power to make the order.]

*E. Hayes* and *J. F. Townsend*, contra.

*Per Curiam.*

The right judgment of this Court is in the common form, namely, that the judgment of the Court below be reversed, and a *venire de novo* awarded; and that the defendants be restored to all that they have lost.

Ordered accordingly.

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E. T. 1858.
*Queen's Bench*
*May* 8.

NOTE.—The record having been remitted to the Court of Queen's Bench, it was now ordered by that Court, that the sum and costs be lodged in Court, to abide the result of the *venire de novo;* the attorney for the plaintiffs undertaking to receive notice of any proceedings in respect of the sum so lodged.

H. T. 1858.
*Exch. Cham.*

BRADFORD, in Error,

*v.*

THE DUBLIN AND KINGSTOWN RAILWAY CO.*

*(Error from the Court of Common Pleas.)*

*Jan.* 26, 27.

Under a deed of conveyance by the Commissioners of the Incumbered Estates Court, certain lands and premises therein described as demised under certain leases were conveyed to the purchaser, and the deed contained the following exception:—"excepting also that portion thereof, containing 12 perches and 3¼ yards, or thereabouts, traversed by the Dublin and Kingstown Railway" (reserving a right of way), "situate in the town of Kingstown, parish of Monkstown and county of Dublin, and described in the annexed map, with the appurtenances." The map included a portion of the 12 perches and 3¼ yards.—*Held*, that there being, irrespective of the map, an adequate description of what was intended to pass under the deed, the subsequent description appearing on the face of the map, being at variance with the former description, might be rejected, on the principle "*falsa demonstratio non nocet*," and that it was the duty of the Judge to admit evidence *dehors* the deed, for the purpose of identifying the particular portion described in the words of the deed.—[PIGOT, C. B. *dubitante.*]

IN this case an action of ejectment on the title had been brought by the defendants in error (the plaintiffs below), to recover possession of 12 perches and 3¼ yards (or thereabouts) of land, situate in the parish of Monkstown and county of Dublin.

This action was tried before Monahan, C. J., at the Nisi Prius Sittings after Trinity Term 1857; and the plaintiffs gave in evidence an indenture of lease, bearing date March the 10th, 1829, whereby Lord De Vesci demised to Edward Armstrong, his executors, administrators and assigns, for the term of ninety-nine years, an undivided moiety of the dwelling-house and premises then in the possession of the latter, containing 67 feet in front and 327 in depth, bounded by certain abuttals set forth in the lease, and subject to the yearly rent of £20 sterling. They also proved another lease of the other undivided moiety of the same premises, made to Edward Armstrong, his executors, administrators and assigns, by Lord Longford and others, of the same date, for a similar term and at the same yearly rent. It was admitted on both sides that the Railway mentioned as one of the abuttals in those

* *Coram* LEFROY, C. J., PIGOT, C. B., PERRIN, J., PENNEFATHER, RICHARDS and GREENE, BB.

deeds was an old tramway, that had been since removed. A warrant, under the seal of the Dublin and Kingstown Railway Company, directed to the Sheriff of the county of Dublin, dated 24th June 1836, was also given in evidence, reciting the intention of the Company to take part of the premises comprised in the above leases, and requiring the Sheriff to empanel a jury to assess the sums to be paid for the purchase of the lands so intended to be taken by them; and they also proved an inquisition made accordingly, dated the 11th of July 1836, by which the jury found that, under the above leases, the premises marked No. 4 on a map attached to the inquisition, and containing 12 perches and 3¼ yards, had been so demised to Edward Armstrong; and further, that a sum of £40 purchase-money and six pence damages ought to be paid by the Company to Edward Armstrong for the premises marked No. 4; and they also proved a deed poll executed to the Company by Edward Armstrong, whereby he granted to them the above piece of ground, containing 12 perches and 3¼ yards, and marked No. 4 on the map annexed to the inquisition, for all his estate therein. This conveyance was not registered. The plaintiffs then proved that they had, under the latter deed, entered into possession, and erected the southern boundary wall of the Railway across the northern extremity of the lot of ground so taken under the inquisition, and that there were on the northern side of that wall, within the Railway, 70 superficial feet, and at the southern side of the wall, outside the Railway, about 11 perches and 25 yards of this piece of ground.

The defendant admitted that he was in possession of a portion of the premises marked No. 4 on the inquisition map, situated outside the southern wall of the Railway, and also admitted demand of possession by the Company, and refusal by him, and founded his title upon a deed of conveyance, bearing date the 7th of July 1852, and executed to him by the Commissioners of the Incumbered Estates Court, by which, after reciting the leases of 1829, they granted to the defendant the premises comprised in those leases, "except as therein is excepted, and excepting also that portion

H. T. 1858.
*Exch. Cham.*
BRADFORD
*v.*
D. & K.
RAILWAY.

"thereof containing 12 perches and 3¼ yards, or thereabouts, and "traversed by the Dublin and Kingstown Railway; and excepting "always unto the Commissioners of Kingstown Harbour free liberty "of ingress, egress and regress through and along that portion "of the said premises upon the map hereunto annexed, marked "as No. 4, for the purpose of repairing and cleansing their sewer, "situate in the town of Kingstown, parish of Monkstown and "county of Dublin, and described in the annexed map, with the "appurtenances," for the residue of the term of ninety-nine years, subject to the rents and covenants contained in the leases of 1829. A memorial of this deed was registered in 1852. An agreement between John Armstrong and the Commissioners of Kingstown Harbour was also proved, entitling them to a right of way through the land in his possession. It was admitted that the portion of the premises lying outside, and to the south of the Railway boundary wall, and which was the subject-matter of the action, had been for several years waste and uninclosed, and also that the Harbour Commissioners had built two walls, forming the eastern and western boundaries of the land sought to be recovered and other premises.

At the close of the trial, his Lordship informed the jury, first, that according to the true construction of the deed of 1852, the premises comprised in and delineated on the map annexed thereto were thereby conveyed to the defendant, although they included a portion of the premises taken by the plaintiffs under the inquisition and deed of 1836.

Secondly, that the conveyance of 1852 was valid and effectual, for the purpose of conveying to the defendant the premises thereby expressed to be conveyed, and that the defendant was entitled to hold them as against the plaintiffs, and that the latter were not entitled to the premises expressed to be conveyed to the defendant by the deed of 1852, or to any part thereof.

Thirdly, that upon the evidence and admissions of plaintiffs' Counsel, the premises sought to be recovered by the plaintiffs were comprised in and constituted part of the lot No. 4, on the map attached to the conveyance of 1852; and therefore his Lordship

directed a verdict for the defendant. To these directions the plaintiffs' Counsel took the following exceptions:—First, as to the first direction; requiring his Lordship to inform the jury that, under the deed of 1852, the Commissioners did except from the grant thereby made to the defendant that portion of the premises taken by the plaintiffs under the inquisition and deed of 1836, containing 12 perches and 3¼ yards, or thereabouts, and did not convey to the defendant any portion of these premises, although a portion of them was included in the map attached to the conveyance of 1852.

Secondly, as to the second direction; requiring his Lordship to inform the jury that, even although the conveyance of 1852 purported to convey to the defendant the premises sought to be recovered by the plaintiffs, yet that it could not have that effect, the same having legally vested in the plaintiffs under the inquisition and deed of 1836, notwithstanding the non-registry of the latter deed, and the due registry of the former.

Thirdly, as to the third direction; requiring his Lordship to direct a verdict for the plaintiffs, it being a fact admitted by the defendant that the premises sought to be recovered by the plaintiffs formed portion of the premises taken by the plaintiffs under the inquisition and deed of 1836; but his Lordship refused to alter his original charge.

These exceptions having been argued before the Court of Common Pleas, that Court pronounced judgment, allowing the first and third exceptions, and awarding a *venire de novo*: and a writ of error having been brought—

*Fitzgibbon* and *Henderson* appeared on behalf of the plaintiff in error.

*Hayes* and *Shaw*, on behalf of the defendants in error.

The following cases were cited:—*Dawson* v. *M'Intire* (*a*); *Doe* d. *Smith* v. *Galloway* (*b*); *Llewellin* v. *The Earl of Jersey* (*c*);

(*a*) 12 Cl. & Fin. 151.

(*b*) 5 B. & Ad. 43; S. C., 2 Nev. & Man. 240.

(*c*) 11 M. & W. 189.

H. T. 1858.
*Exch. Cham.*
BRADFORD
*v.*
D. & K.
RAILWAY.

*Doddington's case* (*a*); *Stukely* v. *Butler* (*b*); *Bullen* v. *Denning* (*c*); *Shep. Touch.*, p. 100; *Dowtie's case* (*d*); *Rex* v. *Bullock* (*e*); *Errington* v. *Rorke* (*f*), *per* PERRIN, J.; *Burton on Real Property*, p. 170, 2nd ed.; *Hubbard* v. *Johnson* (*g*).

*Cur. ad. vult.*

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LEFROY, C. J., delivered the judgment of the Court.

*Jan.* 27.

In this case we are of opinion that the judgment of the Court of Common Pleas should be affirmed.

This is an action of ejectment on the title, brought by the Dublin and Kingstown Railway Company, to recover a certain quantity of land adjoining their Railway. It appears that the land which is the subject-matter of this action was, together with other premises, demised to one Edward Armstrong by Lord De Vesci and Lord Longford, in the year 1829, for a term of ninety-nine years. The land so demised was set out by abuttals; and there is one fact admitted by both parties, viz., that the Railway mentioned in the demise as a boundary was an old tramway which has been since removed, and since the removal of which the present Railway has been constructed.

We next come to the demise made by Armstrong to the Railway Company; but preparatory to that demise, we have the warrant of the Company, stating their claim to take a certain portion of the lands so demised to Armstrong, and requiring the Sheriff to empanel a jury for the purpose of assessing the sum to be paid by the Company for the portion of land required by them; and which was subsequently specified as No. 4, on the face of the inquisition, in a map attached thereto. This portion of land appears to have been surveyed and valued under the inquisition, and precisely tallies in description with the exception in the conveyance from the Incumbered Estates Court, under which the defendant claims. We then have a deed poll, executed to the Company by Armstrong, for the

(*a*) 2 Rep. 33, *a*.
(*b*) Hob. 171.
(*c*) 5 B. & C. 842.
(*d*) 3 Rep. 10, *a*.
(*e*) Taunt. 80.
(*f*) 6 Ir. Com. Law Rep. 330.
(*g*) 3 Taunt. 220.

purpose of carrying into effect the inquisition, by conveying to them all his estate in that portion of ground so valued by the jury, marked in the map or plan as No. 4, and described in the deed as containing 12 perches and 3¼ yards.

All these matters were given in evidence on the part of the plaintiffs below, without any objection, and upon this they rested their case.

No suggestion was made on the other side as to the existence of any other parcel of ground, to which the evidence so given could be referred.

The defendant, on the other hand, made title under a conveyance from the Commissioners of the Incumbered Estates Court.

What then does their conveyance import to do? Does it import to grant these 12 perches and 3¼ yards? No such thing; it imports to convey that which was the subject-matter of the sale, namely, Armstrong's interest in the remainder of these premises; but not the Company's small interest in 12 perches and 3¼ yards which he had previously conveyed to the Railway Company. That is all that the deed of the Commissioners imports to convey, and therefore it refers to the lands demised to him, and to the map No. 4, excepting thereout these 12 perches and 3¼ yards. Now it appears to me that the words of the exception are as plain as the words of the grant. Can it be contended or implied that the grantee in a deed can take under the terms of the grant the very subject-matter of the exception? I admit that if the subject-matter of the exception was of such a nature as that neither by description or matter of fact it could be ascertained or established, it must go for nothing. But is that the case in either of these particulars? In the first place, we have the exact quantity of land described in the documents given in evidence by the plaintiffs, with all precision, as being vested in them. If it be said that this exception be void for want of subject-matter, that is, no doubt, a good rule; but can it be said to apply in this case, with all this evidence before us? Can it be contended that the plaintiffs have not shown distinctly the subject-matter to which they claim title? There may be some difficulty in the execu-

H. T. 1858.
*Exch. Cham.*
BRADFORD
*v.*
D. & K.
RAILWAY.

tion of the *habere*—although I do not anticipate that such will be the case—but the plaintiffs are clearly entitled to a verdict and judgment, upon their own showing; and the question is, whether this right has been taken from them? The Commissioners, by the description of the land in their conveyance, import, beyond all doubt, to grant the estate which Armstrong held—with this qualification, that the defendant was not to take anything more than Armstrong had or held; and they use these words:—"Excepting also that "portion thereof containing 12 perches and 3¼ yards, or thereabouts, "and traversed by the Dublin and Kingstown Railway." Is it possible, with such evidence, that any doubt can arise upon the construction of these words? The evidence, instead of raising an ambiguity as to this portion of ground, clearly points out how it was to be ascertained, by showing that it was so much to be taken out of the lands originally demised to Armstrong.

Therefore, the more reasonable construction of the language of the Commissioners is, that they intended what they expressed, namely, that this quantity of land was to be excepted out of their grant to Bradford; and we therefore cannot suppose that they intended to sell this property according to the map, because the description in the map does not carry out the terms of the contract between the parties. But upon the case as it stands, to raise any question of doubt is really to raise it gratuitously, for the case does not furnish any material for ambiguity, inasmuch as, by the rule of law, a thing which is once described with certainty is not to be affected by a subsequent misdescription of the same thing. "*Falsa demonstratio non nocet.*"

There is no ambiguity in the deed—there is none in the exception; the latter is as definite as it could possibly be; and neither the grant nor the exception require anything else in addition to what they contain, to render complete the description of the property which is the subject-matter of the deed.

I therefore concur with the rest of the Court (except the Chief Baron, who entertains some doubt), that the judgment of the Court below is perfectly correct in principle; that it is in accordance with

the intention of the parties, and that it will carry into effect the object of the Commissioners, which was, to sell this property consistently with the rights of all parties, rather than in a manner prejudicial to the rights of one of them.

PIGOT, C. B.

I confess that I have some doubts as to whether this is a case in which extraneous evidence is admissible to explain the terms of a written instrument (upon the ordinary principle, distinguishing patent from latent ambiguities); that is to say, whether, in the present case, the extraneous evidence that has been received shows that there exists such a doubt as that it may be explained by evidence *dehors* the deed?

Judgment affirmed.

BILL OF E

*See* DEFENCE
FORGERY

M. the holder fo
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# INDEX.

reasonable notice of his intention so to do.

The absenting of himself from his master's service by an apprentice is not an avoidance of the apprenticeship. Q. B. *Coghlan* v. *Callaghan* 291

ARRAY, CHALLENGE TO.

*See* JURY, SPECIAL.

ARREAR OF RATES.

*See* REGISTRY APPEAL, 4.

ARREST OF JUDGMENT.

*See* TOWNS IMPROVEMENT ACT, 1.

ASSAULT AND BATTERY.

*See* PLEADING, 2.

ASSENT.

*See* PRESCRIPTION.

ASSIGNEE.

*See* EXECUTRIX DE SON TORT.

ASSIGNMENT OF REPLEVIN BOND.

*See* REPLEVIN BOND.

ASSISTANT-BARRISTER, JURISDICTION OF.

*See* CIVIL-BILL DECREE.

ATTESTATION.

*See* BILL OF SALE.

ATTORNEY, LIABILITY OF.

*See* PRACTICE, 14.

AUCTIONEER.

*See* PRACTICE, 13.

AVERMENT IN PLEADING.

*See* COVENANT, &c.
PLEADING, 8.

AVOWRY.

*See* REPLEVIN.

AWARD, JUDGMENT ON.

A plaintiff, having marked judgment upon an award, became insolvent; but no suggestion of his insolvency was entered upon the record of the judgment. The defendant having been subsequently arrested, under a *ca. sa.* upon the judgment, the Court set aside the proceedings, but restrained the defendant from bringing an action. C. P. *Carolan* v. *Nolan* 114

BAIL.

*See* PRACTICE, 20.
PRISONER, 1, 2.

BILL OF EXCEPTIONS.

*See* ELECTION LAW.
JURY, SPECIAL.
TOWNS IMPROVEMENT ACT, 1

BILL OF EXCHANGE.

*See* DEFENCE, 1.
FORGERY.

M., the holder for value of a bill of exchange, sued W., the accommodation acceptor, who pleaded infancy. Notice of trial was served in 1855, for the ensuing Summer Assizes, but was afterwards withdrawn, and no further proceedings were taken for more than two years. W., in order to be in a position to apply for a rule, under 16 & 17 *Vic.*, c. 113, s. 106, that the defendant should recover the costs of the action, in default of the plaintiff proceeding to trial, obtained a conditional order, pursuant to General Rule 178, for liberty to proceed. The defendant showed cause, upon the ground that the drawer of the bill had, at the time of the indorsement, represented to him that the defendant was of full age.—*Held*, that the defendant was entitled to an absolute order, under Rule 178, in order that he might, at all events, exercise his Common Law right of taking down the record for trial by proviso. C. P. *Marsh* v. *Williams* 99

BILL OF SALE.

The affidavit required by the 17 & 18

*Vic.*, c. 55, s. 1, to be filed with the Master of the Queen's Bench, upon the registration of every bill of sale, omitted the description of the residence and occupation of one of the attesting witnesses to the bill of sale. —*Held*, that the bill of sale was, by reason of such omission, rendered void, as against an execution creditor.

*Held also*, that such description must accompany every bill of sale so registered, whether executed by a person "under or in execution of any process," or by the owner of the goods. C. P. *Fonblanque* v. *Lee* 550

BONA FIDES.

*See* SLANDER.

BREACH OF CONTRACT.

A contract, in order to be binding, must be mutual, and capable of being enforced by either party.

A plaintiff cannot maintain an action for breach of contract, where part of the promises to be performed by the defendant is illegal, even though the consideration on the part of the plaintiff is untainted with illegality.

A promise to obtain for another the office of post-master is illegal, within the meaning of the 49 *G.* 3, c. 126.

The Court will take judicial cognizance of the meaning of the term "post-master." C. P. *Bourke* v. *Blake* 348

CA. SA.

*See* AWARD.

J. M. was arrested by the Sheriff of D., under a *ca. sa.*, at the suit of Hugh M. T., and was thereupon committed, by the Sheriff, to the custody of the Marshal of the Marshalsea, upon a warrant describing the plaintiff as *Henry* M. T. The prisoner having filed a pauper declaration, pursuant to 5 & 6 *Vic.*, c. 95, s. 7, the officer of the prison thereupon furnished a list of detainers to the Insolvent Court, in which the detaining creditor was described as "Henry;" and a *Gazette* notice, pursuant to section 8, was published accordingly. Hugh M. T. afterwards applied to the Insolvent Court for leave to file a creditor's petition, which was refused, upon the ground that he did not appear by the list, as furnished, to be a detaining creditor, and J. M. was accordingly discharged. The plaintiff in the execution having sued the Sheriff for breach of duty, whereby the prisoner was discharged from custody:—*Held*, on demurrer, that the Insolvent Court ought to have permitted the actual detaining creditor, upon proof of the misnomer, to have filed a creditor's petition; and that, inasmuch as the prisoner's discharge was not the necessary consequence of the Sheriff's mistake, he was not liable to an action. C. P. *Tuite* v. *Handcock* 356

CA. SA. ISSUED BEFORE FI. FA. OUT OF RETURN.

*See* PRACTICE, 11.

CANCELLING WRIT.

*See* PRACTICE, 11.

CERTIFICATE OF AVERAGE PRICE OF CORN.

*See* TITHE RENTCHARGE, 1.

CERTIFICATE OF JUDGE.

*See* PRACTICE, 9.

CERTIORARI.

*See* QUARTER SESSIONS, 1.

1. A Magistrate having, on the hearing of a complaint for a trespass to a several fishery, remained on the Bench with the other Magistrates during its progress, admitting that he was interested in the subject-matter of the complaint, and stating from the Bench that he could prove that other persons than the person complained against had been fined for fishing in

the *locus in quo*, and, after the Court was cleared of the public, remaining with his brother Magistrates until a decision was arrived at—*Held*, to have acted mistakenly and improperly; and a decision come to by the Bench of Magistrates under such circumstances is censurable, and will be reviewed in this Court. Q. B. *The Queen* v. *Massy* 211

2. Upon the hearing at Petty Sessions of a summons against P., for assault, L., who had been summoned as a witness, attended, but the presiding Magistrates, being of opinion that L. was also a party to the assault, erased L.'s name from the column for the names of witnesses in the Petty Sessions book, and inserted it in that for the names of defendants; they then received evidence against L., and convicted and sentenced him to three weeks' imprisonment.—*Held*, that the Magistrates acted without jurisdiction, there having been no previous complaint against L., and a *certiorari* was therefore granted to remove the conviction and proceedings into this Court. Q. B. *The Queen* v. *Justices of Queen's County* 438

CHANGE OF RESIDENCE.

*See* Registry Appeal, 6.

CHARTER-PARTY.

*See* Agreement.

CIVIL-BILL ACT.

*See* Costs.

CIVIL-BILL DECREE.

*See* Trespass, Justification of.

In an action of trespass, the defendant justified, relying on a civil-bill decree against the plaintiff and two others.—Replication, that one of the defendants in the civil-bill was out of the jurisdiction of the Assistant-Barrister, and that service of the civil-bill process had not been duly effected; and also that the Assistant-Barrister had been induced to sign an original civil-bill decree, under which the arrest had been made, instead of a renewal of a former decree.—*Held*, affirming the decision of the Court of Queen's Bench, that fraud in obtaining the decree could not be relied upon, inasmuch as it was not distinctly alleged upon the pleadings; and that it being the duty of the Assistant-Barrister, under the Civil-bill Act (14 & 15 *Vic.*, c. 57, s. 65), to satisfy himself of the residence of the defendants within the jurisdiction, and of the due service of the process, the decree, not having been appealed from, was conclusive. Ex. Ch. *Govern* v. *Rowland* 619

CLERK OF TOWNS COMMISSIONERS, ACTION AGAINST.

*See* Towns Improvement Act, 1.

CLERK OF THE PEACE.

*See* Registry Appeal, 2.

COLLECTOR-GENERAL OF RATES.

*See* Registry Appeal, 4.

COMMISSION TO EXAMINE WITNESSES.

An affidavit to ground an order for a commission to examine a witness resident out of the jurisdiction, on the ground that the party whose evidence is required is unable to attend, in consequence of ill health, must be positive, and one on information and belief is insufficient. Q. B. *Boyce* v. *Rosborough* 17

COMPENSATION.

*See* Railway Works, Injury done by.

COMPOSITION DEED.

A composition deed was executed by an insolvent, for payment of his creditors, which, after reciting that it was intended to be for the benefit of all the creditors named therein, assigned the property of the insolvent to a trustee,

## COVENANT, COLLATERAL AND DEPENDENT.

In an action upon a covenant dependent on the interest granted by a lease "for 99 years, provided the lessor's interest should so long continue"—*Held*, that the summons and plaint, stating the demise merely, was sufficient, without averring the continuance of the interest, which is to be presumed until the contrary be shown.

*Semble.*—The non-execution of a lease by the lessor is a good defence to an action on a covenant to pay rent; *aliter* of a collateral covenant. E. *Boyle* v. *Monk* 279

## CRIMINAL INFORMATION.

*See* PRACTICE, 12.
SUITOR CONDUCTING HIS OWN CASE.

## CROSS DEMURRERS.

*See* PRACTICE, 6.

## CURRENCY.

*See* TITHE RENTCHARGE, 1.

## DEATH OF DEFENDANT.

*See* PRACTICE. 5.

## DECISION OF BARRISTER.

*See* REGISTRY APPEAL, 5.

## DECLARATION OF VACANCY.

*See* TOWNS COMMISSIONERS ACT.

## DECREE, CIVIL-BILL.

*See* CIVIL-BILL DECREE.

## DECREE, REGISTRATION OF.

*See* STATUTABLE MORTGAGE.

## DEED, EFFECT OF.

John Trench the elder, being seised as tenant in tail of the lands of C., by marriage settlement of the 28th of February 1804 conveyed the lands to trustees, "to hold the said premises unto the said (trustees), and to the survivor of them, and to the heirs of such survivor, for and during the term of 500 years, to the use of John Trench for life; and, in case there was issue of both the bodies of John Trench and Mary his wife, then to the use of the eldest son for life." There was indorsement of livery; the deed was not enrolled, and the trustees, who were not relatives of the parties, never entered into possession. Hubert, the eldest son, became of age in 1827, and, between that period and 1833, he and his father respectively confessed several separate judgments. On the marriage of Hubert, the lands were re-settled by a deed of 2nd of March 1834, by which John and Hubert conveyed the lands to trustees, upon the uses following, viz., to permit Hubert to receive the issues and profits of three-fourths, and John of one-fourth, of the lands, during their respective lives; and in case there should be issue male of said marriage, then to the use of the eldest son for life. In 1836, John and Hubert created a rentcharge, to secure certain of the said judgments; and, in 1842, Hubert confessed another judgment. There was issue John Trench the younger. John the elder died in 1848. Hubert died in 1853, having previously taken the benefit of the Insolvent Act. John the younger, who was a minor, entered, claiming under the deeds of 1804 and 1834.—*Held*, that the deed of 1804 could not operate to pass a freehold estate, but that its effect was to create immediately a term of 500 years; that the deed of 1834 operated as a grant of the reversion of the term, which nevertheless continued subsisting until disaffirmed by the issue in tail; that the entry of John the younger, claiming under the deed, had not the effect of avoiding the term, and that as he had a beneficial interest in one of the trusts of the term, and was a purchaser for value, the judgment creditors had no right against his life estate, under the 3 & 4 *Vic.*, c. 105, s. 22. C. P. *In re Trench* 338

## DISCRETION OF MAGISTRATES.

*See* PRISONER, 1.

## DISTURBANCE OF RIGHT OF FERRY.

*See* FERRY, RIGHT OF.

## DISTURBANCE OF RIGHT OF WAY.

In an action for the disturbance of a right of way, the plaint stated that "the defendant wrongfully and injuriously kept and continued a certain vicious and dangerous dog upon the lands of the said defendant, and close to the said way, so that the plaintiff and his family, &c., could not safely or securely, or without dread or apprehension, pass and re-pass along such way, whereby plaintiff was greatly disturbed in the use of the same."—*Held* bad, on demurrer, for not averring that the defendant knew that the dog was of a vicious and mischievous nature, or that he kept it upon the way, or under such circumstances as to cause reasonable danger or apprehension in the use of the way.

Leave to amend the plaint refused. Q. B. *Grainger* v. *Finlay* 417

## DOCUMENTS, PROOF OF.

*See* JURY, SPECIAL.

## DOUBLE MATTER.

*See* PRACTICE, 19.

## EASEMENT.

*See* PRESCRIPTION.

## EJECTMENT.

*See* GENERAL ORDERS.
LEASE, 1.
PRACTICE, 3, 17.

1. A lease, granted in excess of a leasing power, but operating in Equity, under the 12 & 13 *Vic.*, c. 26, s. 2, as a contract for a grant of a valid lease, pursuant to the power, is not an equitable defence to an ejectment on the title, under the Common Law Procedure Act *(Ir.)* 1856, s. 85.

*Semble.*—An agreement for a lease is not an equitable defence to an ejectment on the title, within the meaning of that section.

*Dictum* of CRAMPTON, J., in *Turner* v. *M'Auley* (6 Ir. Common Law Rep., 257), observed upon. Consc. Cham. *Deering* v. *Lawler* 33

2. The plaintiff, in an action of ejectment upon the title, had, prior to the termination of the tenancy of the defendant (who was a yearly tenant), by notice to quit, demised the lands to D. for the year succeeding the defendant's tenancy. The plaintiff was unable to induce D. to join him in the ejectment as co-plaintiff, and had been threatened by D.'s attorney (who was also attorney for the defendant) with legal proceedings, for breach of agreement. The defendant alleged that he had a good defence to the action (independent of the tenancy of D.), but refused to disclose the nature of it. Motion to stay the defendant from relying on D.'s tenancy, as being merely a temporary bar, granted. C. P. *Olden* v. *Stokes* 602

## ELECTION LAW.

A deputy, appointed by a Returning-officer, under the 13 & 14 *Vic.*, c. 68, s. 14, is not, by virtue of such appointment, an independent functionary, but remains, during the continuance of the election, subject to the supervision, and under the control of, and is bound to act upon, the instructions from time to time given to him by such Returning-officer. Therefore, when at an election a deputy so appointed improperly rejected the plaintiff's vote, the defendant, as Returning-officer, though called upon, refusing to review the decision of his deputy, or to hear the matter discussed before him, on the ground that he had no jurisdiction under the Act of Parliament, is liable in an action for such rejection of the plaintiff's vote by his deputy.

A refusal to nonsuit is not the ground of an exception. An exception lies to any rule made by the Judge at the trial, or to what he says in his charge, or any part of it; but not to what he does not say or refuses to say. The exception should be for *misdirection*, not for *non-direction*. The refusal of the Judge to withdraw from the consideration of the jury evidence not objected to at the time of its reception is not the ground of an exception. Q. B. *Sedley* v. *M'Gowan* 427

ELECTION OF TOWNS COMMISSIONERS.

*See* TOWNS IMPROVEMENT ACT, 2.

EMBARRASSING DEFENCE.

*See* PRACTICE, 13.

ENGLISH COMMISSIONERS, JURISDICTION OF.

ıe Court of Queen's Bench, in appointing Commissioners in England for the Irish Common Law Courts, does not limit them to a particular place within the district for which they are appointed. Q. B. *In re Miller* 5

ENROLMENT.

*See* DEED, EFFECT OF.

EQUITABLE DEFENCE.

*See* EJECTMENT, 1.
PLEADING, 6.
PRACTICE, 3, 21, 22.

› an action for £102. 10s., for the rent of a house, the defendant pleaded (by way of defence on equitable grounds) a parol agreement between the plaintiff and defendant, in pursuance of which the plaintiff had accepted judgment by consent, in an action of ejectment for the house, for non-payment of £93. 15s., the rent due, and had taken possession of the house, and also of certain fixtures, goods and chattels, the property of the defendant, which fixtures, &c., together with the defendant's interest and good-will in the house, being of the value of £200, it was agreed should be sold on behalf of the plaintiff, and the balance, after deducting £93. 15s., due for the arrears of rent, paid over to the defendant; and the defendant averred that, owing to the plaintiff's neglect, the sale never took place.—*Held*, that this defence was not such an equitable defence as is contemplated by the Common Law Procedure Amendment Act (Ireland) 1856.

*Semble*, an equitable defence, within the meaning of that statute, must afford materials to the Court for doing complete and final justice between the parties. Q. B. *Daniel* v. *M'Carthy* 23

ERASURES.

*See* PRACTICE, 15.

ERROR.

*See* COURT OF EXCHEQUER CHAMBER, JURISDICTION OF.

ESCHEAT.

*See* MANORIAL LANDS.

ESTATE TAIL.

*See* WILL, 1.

ESTOPPEL.

*See* CIVIL-BILL DECREE.
LANDLORD AND TENANT, 2.

EVICTION BY TITLE PARAMOUNT.

*See* PLEADING, 1.

EVIDENCE.

*See* JURY, SPECIAL.
REGISTRY APPEAL, 5.
STAMP.

Under a deed of conveyance by the Commissioners of the Incumbered Estates Court, certain lands and premises therein described as demised under certain leases were conveyed to the purchaser, and the deed contained the following exception:—"excepting also that portion thereof, containing

and secondly, because the jury were not returned or summoned by the Sheriff of said county. The plaintiff, by his counterplea, alleged the making of a Judge's order for the attendance of one of the Coroners before the Master of the Queen's Bench, to enable the Master to ballot for a special jury, in accordance with the former practice existing before the 16 & 17 *Vic.*, c. 113. The counterplea averred the balloting for and reduction of the list of names so drawn; that, by a certain writ issued out of said Court, and under their seal, directed to said Coroners, they were commanded "to have before the Justices of the Queen's Courts, on the day named, or before one of the Justices appointed to hold the Assizes in and for K., if they should come before, &c., the said jurors, &c., and that they were summoned accordingly." The defendants replied to the counterplea that the order had been made *in invitos*, notwithstanding their protest. The plaintiff having demurred to this replication, the challenge was overruled, and an exception was accordingly taken.—*Held*, that by reason of the order to strike a special jury according to the former practice, the provisions of the Common Law Procedure Amendment Act, 1855, s. 109, relative to the issuing of a precept, did not apply to the case of a jury so summoned.

*Held also*, that there is nothing in the 3 & 4 *W.* 4, c. 91, or in the Common Law Procedure Amendment Act, to deprive the Coroner of his Common Law function of acting, in place of the Sheriff, in the summoning of juries, whether common or special, where the Sheriff is under disability.

*Held also*, with reference to an objection that it did not appear that the writ of *habeas corpora juratorum* was preceded by a writ of *venire facias*, that even assuming the omission to be material, it was only ground of error, but not of challenge.

In the course of the trial, the plaintiff read in evidence the following documents; first, an attested copy of an affidavit sworn by one of the defendants, in a petition matter, in the Incumbered Estates Court; and secondly, an office copy of objections, verified by a solicitor on behalf of the defendants. The evidence was objected to, upon the ground that the plaintiff had not proved the petition in said matter, so as to give the Court jurisdiction; and also, that the objections had not been signed.

*Held*, that these documents were admissible, as admissions, without proving the proceedings in the matter.

*Held also*, that the agency of the solicitor, who verified the objections, not being disputed, the defendants were bound by his acts in relation thereto.

*Quære.*—Whether the overruling of a challenge to the array can be made the subject-matter of an exception? C. P. *Earl of Aldborough* v. *Bland* 571

## JURISDICTION OF QUARTER SESSIONS.

*See* Tithe Rentcharge, 2.

## JUSTICES OF PEACE, ACTION AGAINST.

In an action against a Justice of the Peace, it is necessary, under the provisions of 12 *Vic.*, c. 16, s. 9, that the name and place of abode of the plaintiff's attorney should appear on the back of the notice of action (when the notice of action has been served by the attorney); and it is not sufficient that they should appear in the body or at foot of it.—(Krogh, J., *dissentiente*).—C. P. *Collins* v. *Hungerford* 581

## JUSTIFICATION.

*See* Replevin.

## LANDLORD AND TENANT.

1. A tenant *pur auter vie* demised to another for one year certain, and

afterwards from year to year, should the lessee so desire, during the continuance of the lessor's term.—*Held*, such a letting as came within the terms of the Apportionment Act, 23 & 24 *G.* 3, c. 46. E. *Kennan* v. *Brennan* 268

2. A demise of lands, simply (without exceptions), operates to pass the crops then growing thereon. Where a former tenant was entitled to the growing crops as emblements, and the landlord, after making such demise, purchased that former tenant's rights:—*Held*, that he could not derogate from his own grant, and was estopped by the demise from saying that the crops did not belong to the new lessee. E. *Copley* v. *Enright* 393

LAST FOUR DAYS OF TERM.
*See* PRACTICE, 12.

LEASE.
*See* LANDLORD AND TENANT, 2.

1. A lease for lives contained the following exception:—"Excepting and reserving unto the said (lessor) all mines, minerals and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises, and carry away the same."—*Held*, not to include open limestone quarries which the lessee had been in the habit of working.

*Semble.*—Ejectment was not the proper remedy of the lessor in this case, but either to remove the limestone himself, or bring trover for it when removed by the lessee. C. P. *Brown* v. *Chadwick* 101

2. The word "release," in the 8 & 9 *Vic.*, c. 106, s. 3, is to be construed as bearing its ordinary meaning, and therefore, under the provisions of that statute, every lease, required by law to be in writing, must be made by deed. C. P. *Gilman* v. *Crowly* 557

LIABILITY.
*See* MONEY PAID, 1.

LIABILITY OF AUCTIONEER.
*See* PRACTICE, 13.

LIBEL.

1. In an action of libel, for articles published in a newspaper, the defendant is not entitled, on motion, to an inspection of the articles on which the motion is founded. Q. B. *Finlay* v. *Lindsay* 1

2. In an action for libel, the summons and plaint alleged that R. (the plaintiff), who was the apprentice of V., an attorney in an action then pending, had made an affidavit, to be used on a motion in the latter action; and that K. (the defendant) had falsely and maliciously written a letter to V., stating that R. had in his affidavit disclosed a conversation that had taken place between R. and K., and had suppressed the truth and asserted what was false by his affidavit; with the following inuendo, "meaning thereby that the plaintiff had been guilty of perjury, by wilfully suppressing the truth and asserting falsehood," &c.

The defendant pleaded that he was attorney for the other party in the action in which the motion was pending, and that he, believing that the affidavit did not truly represent what had occurred, and contained reflections injurious to himself, wrote the letter in question, for the purpose of correcting the averments in the affidavit, and preventing its being used on the motion; and that he wrote the letter believing it to be true, and *bona fide*, and without malice in fact. —*Held*, to be a privileged communication.

*Held also*, that although the defence did not in terms admit that the defendant believed the plaintiff to have been guilty of perjury, as complained of in the summons and plaint, it was sufficient upon demurrer.

*Held also*, that expressions used in excess of what the occasion warranted will not of themselves divest the com-

insufficient, as covering only part of the cause of action. Q. B. *Ammermann* v. *Robins* 415

5. Plaint for £64. 6s. 9d., for goods bargained and sold, and for goods sold and delivered, and for money due on an account stated. Defence, that the money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant, and for goods sold and delivered by the plaintiff to defendant, and for money found to be due from defendant to the plaintiff, on accounts stated between them, was of the amount of £46. 15s. 0d., and no more; and that the said sum of £46. 15s. 0d. has been paid by the defendant to the plaintiff, and is sufficient to satisfy the plaintiff's demand.—*Held* bad, as amounting to the general issue. Q. B. *Alcock* v. *Hurley* 424

6. To an action for a breach of contract for the sale of land, in not furnishing the abstract of title within the time prescribed by the conditions of sale, the defendant was allowed to plead, by way of equitable defence, facts which amounted to a waiver, on the part of the plaintiff, of his right to insist upon the strict terms of the contract. Q. B. *Fitzgerald* v. *M'Cullagh* 457

7. In an action brought by an administratrix, for money lent, paid, &c., and for work and labour done by the intestate in his lifetime, to and for the defendant, the latter pleaded, as to a portion of the cause of action, the Statute of Limitations. The plaintiff, in order to take the case out of the operation of the statute, relied upon the following passage in a letter written by the defendant to her attorney, within six years next before the commencement of the suit:—"If Mrs. H. (the plaintiff) can prove I owed her late husband any money for costs or otherwise, I am willing to have it settled at once. This can easily be done by producing the receipts for the amounts of money he had of mine in his hands."—*Held*, that as the condition specified in the letter, regarding the production of receipts, did not appear to have been performed by the plaintiff, prior to the commencement of the action, the document was not evidence of such a promise to pay the debt on request as would defeat the bar of the Statute of Limitations.

*Semble.*—That in order to entitle the personal representative to rely upon an acknowledgment made to himself by the debtor, as taking the case out of the operation of the Statute of Limitations, a count is required similar to that used under the former rules of pleading, stating that the defendant promised to pay the personal representative on request. C. P. *Holmes* v. *Smith* 461

8. A summons and plaint for maliciously and falsely exhibiting an affidavit, containing false statements, to the Commissioners of the Incumbered Estates Court, and thereby causing an injunction for possession to be issued out of said Court, whereby the plaintiff was turned out of the possession of certain lands—*Held* bad, on demurrer, as not showing that the injunction (being the process of a Court of competent jurisdiction) was at an end or determined. E. *Munce* v. *Black* 475

POST-MASTER.

*See* Breach of Contract.

POWER OF LEASING.

*See* Ejectment, 1.

PRACTICE.

*See* Agreement.
Amendment of Writ served.
Payment of Money into Court.
Prescription.
Towns Improvement Act, 1.

1. On a motion to attach debts, under the garnishee clauses of the Common Law Procedure Act, the garnishee must appear by Counsel, and not by attorney. Q. B. *Delahunt* v. *Bennett* 8

2. Where the garnishee files an affidavit for cause against a summoning order, the plaintiff must bring the matter before the Full Court by motion on notice. Q. B. *Murphy* v. *Bennett* 9

3. In an action of ejectment on the title, the Court refused to allow facts to be pleaded as an equitable defence, under s. 85 of the Common Law Procedure Amendment Act (Ireland) 1856, where such facts would involve the taking of an account. Consol. Cham. *Cochrane* v. *Camack* 10

4. When a demurrer is set down for argument, and notice served, it is forthwith listed and liable to be called on. Consol. Cham. *Kenyon* v. *Young* 12

5. In an action of ejectment on the title, both defendants, R. and W., had been served with the ejectment. R. took defence. W. died without taking defence, but after the expiration of the time limited for taking defence. Leave granted to enter a suggestion of the death of W., according to the former practice, this case not being provided for by the Common Law Procedure Act 1853. Consol. Cham. *Kelly* v. *Caldwell* 12

6. In cases of cross demurrers, the right to begin is regulated by convenience; thus, where the defendant has pleaded, and also demurred to the whole plaint, he is allowed to begin. Q. B. *West* v. *Barrington* 16

7. After a trial had, and a verdict set aside on an issue raised on the defence, the Court will not allow a replication to be pleaded, unless a strong case be made for the exercise of this jurisdiction. Q. B. *Morris* v. *Hartley* 17

8. In an action on a lost bill of exchange, plaintiff offered an indemnity (which was insufficient) to the defendant, which the latter, without making any objection as to its insufficiency, refused altogether to accept, and pleaded the loss of the bill. The plaintiff having applied to set aside this defence, and for liberty to mark this judgment:—*Held*, that his proper course was that pointed out by the 90th section of the Common Law Procedure Act 1856, namely, to apply to the Court to settle a proper indemnity, when that proposed was refused by the defendant; but in consequence of the defendant's conduct, and his not having made a specific objection to the proposed indemnity, that the motion should be granted, without costs, upon plaintiff's entering into a proper indemnity. E. *Clarke* v. *Bowman* 49

9. Where an action is brought asserting a title, and the defendant does not dispute the title, but raises an issue of fact, on which a verdict is found for the plaintiff for nominal damages, and the Judge certifies for the plaintiff's costs, the Court will not interfere with such decision of the Judge, it being made in the exercise of a discretion vested in him. Q. B. *Concannon* v. *Kelly* 133

10. The Court will grant a garnishee order, under the Common Law Procedure Act 1856, s. 63, to attach a debt, the amount of which is unascertained. Q. B. *Daniel* v. *M'Carthy* 261

11. If a Sheriff makes a seizure under a writ of *fi. fa.*, the plaintiff cannot take the defendant in execution under a writ of *ca. sa.*, until the writ of *fi fa.* is returned, although he abandons the seizure of the goods.

A Sheriff, having seized under a writ of *fi. fa.*, has no power to abandon the seizure, but must make a due return to the writ.

A writ of *fi. fa.* was issued on November 9th, upon a judgment obtained by A against B. The writ was returnable on 12th of November. The Sheriff, on November 10th, went to the lands of B; but, considering his goods and chattels insufficient in value, gave back the writ to A, whose attorney, on the same day, took the *fi. fa.* to the office, where it was cancelled, and a *ca. sa.* issued, under which B was arrested on 13th of

Quarter Sessions, for the reduction of tithe rentcharge, a Magistrate, who was land agent of one of the tithe rentcharge payers, was present during the hearing of and adjudication upon the application; but it did not appear that he took any part in the proceedings.—*Held*, that the adjudication was not thereby rendered invalid. Q. B. *The Queen* v. *Justices of Cork* 260

QUO WARRANTO.

*See* TOWNS IMPROVEMENT ACT, 2.

RAILWAY WORKS, INJURY DONE BY.

Where acts were done by a Railway Company, under the powers conferred on them by 13 & 14 *Vic.*, c. 45 (Loc. and Per.), the person injuriously affected by such acts can only obtain compensation in the manner pointed out by the statute, and not by action at Law.

Compensation may be awarded by arbitration under this statute from time to time, whenever injury is done to individuals by the Railway works. C. P. *Little* v. *Dublin and Drogheda Railway Company* 92

RATES PAYABLE BY INSTALMENTS.

*See* REGISTRY APPEAL, 4.

RATING.

*See* TOWNS IMPROVEMENT ACT, 2.

RECEIVER'S FEES, ACTION FOR.

Where, to an action for receiver's fees, the defendant having replied a judgment recovered in his favour in a former suit for the same demand, the plaintiff rejoined that the judgment was one on a demurrer which did not go to the merits of the cause. The defendant having neglected to rejoin or demur to this replication, the Court allowed the plaintiff to enter a rule, requiring the defendant, in the alternative, to rejoin or demur in four days, or judgment.—*Semble*, the 102d section of the Common Law Procedure Act does not authorise the settlement of an issue which can be tried only by the Court. Q. B. *Blount* v. *Evans* 97

REGISTRATION.

*See* BILL OF SALE.
STATUTABLE MORTGAGE.

REGISTRY APPEAL.

1. Three persons were the joint owners and occupiers of premises in the borough of Carlow, rated at the annual value of £35. Two of these were not rated for the premises, but the claimant to register was rated for the whole.—*Held*, that the claimant was entitled to be registered, though the other joint occupiers were not on the rate-book. Ex. Ch. *Sheane's case* 366

2. The name of a claimant was published in the list of the Clerk of the Peace, of claimants entitled to be registered and to vote in the election of County Members. An objection being duly made to his name appearing on the list, the claimant proved his qualification before the Assistant-Barrister, but admitted that the signature to his notice of claim was not in his handwriting.—*Held*, that the Barrister had no jurisdiction to inquire into the validity of the notice of claim to the Clerk of the Peace, the name of the claimant being returned to him as a claimant on the list. Ex. Ch. *Barnett's case* 369

3. A claimant to register was entered in the list of claimants as the rated occupier of out-house and offices at Gully, at the requisite annual value to qualify for a vote. It appeared that in March 1856, the claimant gave the lands of Gully, for which he was rated, to a person named Thomas, for the purpose of taking a crop of oats, and that he then had no further claim on the lands.—*Held*, that the claimant was not in occupation of the lands twelve months

REJOINDER.

*See* Receiver's Fees, Action for.

RELEASE.

*See* Lease, 2.

## STATUTES CITED.



## STATUTABLE MORTGAGE.



## SUGGESTION.



## SUGGESTION OF BREACHES.



## SUITOR CONDUCTING HIS OWN CASE.



## SUMMONS AND PLAINT, AMENDMENT OF.



## TEMPORARY BARS.



## THREAT OF PROCEEDINGS.



## TIME.



## TITHE RENTCHARGE.

c. 99), and dated the 11th of October 1828, to be 15s. 2d.

*Held* (CRAMPTON, J., *dissentiente*), that although, *prima facie*, the 15s. 2d. must be presumed to be British currency, yet the Justices at Quarter Sessions, upon an application to alter the averages, pursuant to the Tithe Rentcharge Acts, were bound to receive evidence that the 15s. 2d. was intended to represent late Irish currency. Q. B. *The Queen* v. *Justices of Mayo* 234

2. An order of the Magistrates in Quarter Sessions, for varying the amount of the tithe rentcharge of a parish, pursuant to the 4 *G.* 4, c. 99, s. 43, and 1 & 2 *Vic.*, c. 102, s. 32, having been quashed on the return to a *certiorari*, after the 1st of November, in the seventh year during which such variation should be made: upon an application for a mandamus, to direct the Magistrates to enter continuances of the proceedings prior to the order which was quashed, and to adjudicate thereon—*Held, per* LEFROY, C. J., and PERRIN, J., the statute having provided that such variation should be made between the 1st of May and the 1st of November in every seventh year, from the expiration of the time limited by the certificate of composition, that the Magistrates had no jurisdiction to proceed after that period; but—*Per* CRAMPTON and MOORE, JJ., that a mandamus should be granted. Q. B. *The Queen* v. *Justices of Mayo* 249

## TITLE OF PLAINT.

*See* DEMURRER.

## TOLLS.

*See* FERRY, RIGHT OF.

## TOWNS COMMISSIONERS ACT.

In an action for penalties, under the 9 *G.* 4, c. 82, *ss.* 18, 69, against the chairman of the Commissioners for the town of Q., the plaintiff, in one count of the plaint, averred that J. F., one of the Commissioners, was beneficially interested in a contract, whereby he became disqualified as a Commissioner, and that the plaintiff (being duly qualified for that purpose) required the defendant to notify such disqualification of J. F., and that his office was thereby vacant, and also to convene a meeting for the election of a Commissioner in the place of J. F., and to proceed thereon as directed by the Act. Breach, that the defendant neglected to notify such disqualification, and to convene such meeting. Demurrer, because the above count contained no averment that a declaration of vacancy had been made, and that therefore the duty of the chairman had not arisen, and no penalty had been incurred.—*Held*, that it is unnecessary that a meeting of the Commissioners should be convened for the purpose of declaring the vacancy, prior to the meeting for electing a new Commissioner.

*Per* LEFROY, C. J., CRAMPTON and MOORE, JJ.; a declaration of vacancy by a meeting of the Commissioners is unnecessary.

*Sed per* PERRIN, J., *dubitanter*, such declaration is necessary, but may be made at the same meeting by which the new Commissioner is elected. Q. B. *Seymour* v. *Scott* 409

## TOWNS IMPROVEMENT ACT.

1. An action against the Commissioners of a town, constituted under the Towns Improvement Act, sued by their clerk, in their *quasi* corporate capacity, will not lie for damages for an improper dismissal from that office.

If any liability for such dismissal attach, it can only be actionable against the Commissioners personally. Where a bill of exceptions is taken, a motion in arrest of judgment cannot be made; and if an order have been

granted on such motion, it can only be upheld by abandoning the exceptions, otherwise there might be two writs of error on the same record. Money having been lodged in Court on one count of a summons and plaint, and drawn out by the plaintiff, that count is to be afterwards considered as struck out, and should be wholly excluded from consideration on a motion in arrest of judgment as to the other counts. Q. B. *Richardson* v. *Corcoran* 121

2. Upon an application for a *quo warranto* information, to question the election of Town Commissioners, under the Towns Improvement Act (Ireland) 1854 (17 & 18 *Vic.*, c. 103), the Court, in order to carry out the objects of the Act effectually, will, in every case, as far as it possibly can, adjust disputes arising out of elections under that Act, when the facts appear sufficiently upon the affidavits.

A person who had been an insolvent debtor twelve years previously, but ever since that time had been in solvent circumstances, was elected Town Commisssioner.—*Held*, that the previous insolvency created no disqualification under the 17 & 18 *Vic.*, c. 103, and 10 *Vic.*, c. 16, s. 8.

In order to be qualified to vote in the election of Town Commissioners, the voter must have actually *paid*, and not merely tendered, the amount due for county cess, in respect of the premises for which he is rated. It must also appear upon the rate-book that he is rated in respect of tenements within the borough, occupied by him, to the net annual amount of £4. A general rating to a much larger amount, in respect of tenements partly within and partly without the borough, is not a qualification.

A voter is disqualified from voting in the election of Town Commissioners, by demising part of the premises, whereby the net annual value of the part in his own occupation is reduced below £4 per annum.

A voter, who stated to the Returning-officer that he had voted before at the same election, was properly rejected, although such statement might have been made through misrepresentation or mistake.

A Town Commissioner, who has been served with the conditional order for a *quo warranto*, but disclaims the office, is entitled to costs of appearing by Counsel.

*Quære.*—Will the Court entertain an objection to a voter, which was not taken at the election of the Town Commissioners? Q. B. *The Queen* v. *Brady* 610

## TRESPASS.

*See* Civil-bill Decree.
Landlord and Tenant, 2.
Replevin.

A defence of justification to an action of trespass relied on a civil-bill decree against the plaintiff and two others; the plaintiff replied, alleging that, at the time the decree was obtained, service of process had not been made, and that one of the defendants in the civil-bill was out of the jurisdiction of the Assistant-Barrister; and it further stated that the Assistant-Barrister had been induced by the now defendant to sign an original decree, instead of a renewal of a former decree.—*Held*, on demurrer, that the decree, being formal on the face of it, and unappealed from, was conclusive, and that its validity could not be questioned in the present action.—[Crampton, J., *dissentiente.*] Q. B. *Govern* v. *Rowland* 218

## UNASCERTAINED DEBT, ATTACHMENT OF.

*See* Practice, 10.